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IN THE
Supreme Court of the United States

OSAGE NATION,

Petitioner,

v.

CONSTANCE IRBY, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION; THOMAS E. KEMP, JR., CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; AND JERRY JOHNSON, WARDEN, VICE-CHAIRMAN OF THE OKLAHOMA TAX COMMISSION.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Solem v. Bartlett*, 465 U.S. 463 (1984), this Court held that "only Congress can divest a reservation of its land and diminish its boundaries," and Congress's intent to do so must be "explicit[]" and "unequivocal," *id.* at 470-471. The Questions Presented are:

I. Whether, in determining whether Congress disestablished an Indian reservation, express statutory text, unequivocal legislative history, and the expert view of the Executive Branch are controlling, as the Second, Eighth, and Ninth Circuits have ruled, or whether, instead, other indicia external to the statutory text and federal government's view, such as modern demographics, can override unambiguous statutory text, as the Tenth Circuit and Seventh Circuit have held.

II. Whether the court properly ruled that the Osage Nation's reservation has been disestablished in the absence of unambiguous statutory direction and without obtaining or considering the position of the United States government.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

RULE 29.6 DISCLOSURES

Petitioner Osage Nation has no parent corporation, and no publicly owned corporation owns ten percent or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

The Osage Nation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 3a) is reported at 597 F.3d 1117. The order and judgment of the district court (App., *infra*, 24a) are reported at 597 F. Supp. 2d 1250.

JURISDICTION

The court of appeals entered its judgment on March 5, 2010. A timely petition for rehearing was denied on May 25, 2010. App., *infra*, 1a. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced at App, *infra*, 57a-71a.

STATEMENT OF THE CASE

1. The Osage Nation is a federally recognized Indian tribe, and its reservation was formally established by Congress in 1872 in what was then known as "Indian territory." Act of June 5, 1872, ch. 310, 17 Stat. 228. The State of Oklahoma was admitted to the Union by the Oklahoma Enabling Act. 34 Stat. 267 (1906) ("Oklahoma Act"). Section 2 of the Oklahoma Act required apportionment of the Territory into 56 districts, one of which was to be coextensive with the Osage Reservation. *Id.* at 268. That requirement was also incorporated into the Constitution of the State of Oklahoma, which provides that "[t]he Osage Indian Reservation with its present boundaries is hereby constituted one county to be known as Osage County." Okla. Const., art. XVII, § 8. In addition, Section 3 of the Oklahoma Act restricted "the manufacture, sale, barter, giving away * * * of intoxicating liquors within those parts of said State *now known as* * * * *the Osage Indian Reservation* and within any other parts of said State *which existed as Indian reservations*." (emphasis added).

From the Reservation's inception through the present time, the Nation has operated its tribal government from this homeland and has protected important historic and cultural resources on behalf of the Osage people. C.A. App. 26-47 (Osage Nation Constitution). In 1904 and 1905, substantial oil and gas reserves were discovered in the Osage Reservation. *Cohen's Handbook of Federal Indian Law* 311 (Nell Jessup Newton et al. eds., 2005) ("*Cohen*"). To protect the Nation's financial well-being and to prevent exploitation of individual tribal

members, Congress enacted the Osage Allotment Act of June 28, 1906 ("Osage Act"). Unlike many other allotment Acts of the era, which opened Indian lands to settlement by non-Indians, *see* Act of Feb. 8, 1887, 24 Stat. 388 (General Allotment Act), the Osage Act allotted the surface estate in trust exclusively for individual Osage members, while the most valuable part of the Reservation – the subsurface – was reserved in trust for the benefit of the Osage Nation. Osage Act §§ 2-3 (App., *infra*, 59a-67a).

The Osage Act repeatedly referenced the Reservation in the present and future tense. *See* Osage Act § 4 (App., *infra*, 68a) (set aside from oil and gas royalties for "schools on the Osage Indian Reservation * * * conducted for the education of Osage children"); *id.* § 7 (App., *infra*, 70a) (requiring that leases and deeds for lands in the Reservation be subject to approval by the Secretary of the Interior); *id.* § 10 (App., *infra*, 71a) (permitting the establishment of public highways or roads "in the Osage Indian Reservation"); *id.* § 11 (App., *infra*, 71a) (allowing railroad companies to continue the use and benefit of certain lands "in the Osage Reservation").

By reserving the subsurface estate for the Nation and limiting allotment to Osage members, Congress ensured continued federal superintendence over the Osage Reservation. That supervision has continued without interruption and has produced a complex and frequently modified scheme of federal regulation and administration of tribal and individual property rights pertaining to the Osage Reservation embodied in a body of federal regulations acknowledging the continued existence of the Osage Reservation. *See*

generally 25 C.F.R. pt. 177 (1938) ("Agricultural and Grazing Leases, Osage Nation, Oklahoma"); 25 C.F.R. pt. 180 (1938) ("leasing of Osage Reservation Lands for Oil and Gas Mining"); 25 C.F.R. pt. 204 (1938) ("Leasing of Osage Reservation Lands, Oklahoma, for Mining, Except Oil and Gas").

2. In 2000, the Oklahoma Tax Commission issued a ruling that asserted a legal claim to collect state income taxes from tribal members who both work and reside on the Reservation. C.A. App. 48-53. The Nation responded by filing suit in the United State District Court for the Northern District of Oklahoma. The complaint sought a declaratory judgment that the Osage Reservation was not disestablished and remains Indian country within the meaning of Section 18 U.S.C. § 1151, and thus federal law precluded the State from taxing those members of the Nation who both earn income and reside within the geographical boundaries of the Nation's Reservation. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995).

Respondents initially moved to dismiss on Eleventh Amendment grounds, but, after the Nation amended its complaint to include individual members of the Oklahoma Tax Commission, the Tenth Circuit ruled that the suit could continue against the individual members under *Ex Parte Young*, 209 U.S. 123 (1908).

The district court then granted summary judgment for respondents. App., *infra*, 24a-56a. The court held that the Osage Reservation had been disestablished, relying heavily on the fact that the

land was allotted to individual Osage members and Congress's practice with respect to other Oklahoma tribes during the same time period. App., *infra*, 37a-45a.

3. The court of appeals affirmed. App., *infra*, 3a-23a. The Tenth Circuit acknowledged that "the Act did not open any land for settlement by the non-Osage, there is no sum-certain or any other payment arrangement * * * [and] neither the Osage Allotment Act nor the Oklahoma Enabling Act contain express termination language." App., *infra*, 14a. The court thus concluded that "the operative language of the statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation." App., *infra*, 14a.

The court nevertheless ruled that the Reservation was disestablished, relying on the general history of the allotment process, a few comments in the legislative history of the Osage Act, and "[t]reatises and articles in professional journals." App., *infra*, 17a. The court also relied on modern demographic data. App., *infra*, 21a-22a.

The court then rejected the Nation's citation of additional federal statutes expressly referring to the Osage Reservation and recognition of the Reservation by the Executive Branch as "too far removed temporally from the 1906 Act." App., *infra*, 19a (discussing recognition of the Reservation in a House Report in 2004, a 2005 National Indian Gaming Commission opinion letter, and two compacts between the State of Oklahoma and the Nation).

REASONS FOR GRANTING THE WRIT

The court of appeals held that the same Osage Reservation that was repeatedly recognized in the plain text of the Osage Allotment Act of 1906, was textually discussed in prospective language, and has been acknowledged in subsequent statutes and decades of Executive Branch regulations and positions was disestablished by equivocal references in that Act's legislative history, professorial writings, and demographic statistics. In so ruling, the court of appeals adopted and imposed a legal test for disestablishment that is contrary to this Court's precedent and expands and entrenches a conflict in the circuits concerning the proper legal test for disestablishment. While the Second and Ninth Circuits have held that disestablishment may not be inferred in the absence of "substantial and compelling" contemporaneous evidence of congressional intent, and the Eighth Circuit limits its inquiry to the statutory text and contemporaneous legislative evidence, two other circuits (the Seventh Circuit and now the Tenth Circuit) have permitted non-contemporaneous sources entirely external to the relevant statute and the position of the federal government to effect disestablishments.

The court of appeals' decision is also contrary to repeated recognition of the Reservation's existence and continuance by the Executive Branch. Indeed, its disestablishment ruling was entered without even asking for or considering the United States' view on a disestablishment that only the federal government can effect. Instead, while relying on demographic statistics and professorial writings that post-dated

the 1906 Act by a minimum of several decades, the court of appeals declared that evidence of the federal government's view was irrelevant because it was "too far removed temporally from the 1906 Act" to be considered.

Finally, the question is a recurring one the settled resolution of which is of importance not only to Indian tribes, but also to the federal and state governments. Uncertainty and variability in this area of law equally affects the ability of Indian tribes and state and local governments to plan for and exercise governmental authority and economic development. An issue of such unique federal superintendence, control, and expertise that has such a direct impact on the day-to-day operations of tribal, state, and local governments should have a single federal rule. Only this Court's review can provide that much-needed uniformity.

I. THE COURT OF APPEALS' DECISION EXPANDS AN INTER-CIRCUIT CONFLICT OVER THE LEGAL TEST FOR DISESTABLISHMENT OF A RESERVATION.

Review by this Court is warranted because the Tenth Circuit's holding that disestablishment can occur in the absence of any express indication in the statutory text or legislative history and without considering the position of the United States expands a recurring conflict in the courts of appeals over the proper legal test for disestablishment of a

reservation.[1]

The "first and governing" rule, oft repeated by this Court, is that "only Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Congress's intent to disestablish a reservation, moreover, must be "explicit[]." *Ibid.* Unless "Congress explicitly indicates otherwise," land set aside as a reservation retains that status "no matter what happens to the title of individual plots within the area." *Ibid.*; *see id.* at 478 ("clear statement of congressional intent" required).

The conflict has arisen in how courts of appeals determine that Congress has "explicitly" directed the disestablishment of a reservation. In this case, the Tenth Circuit held that, even when the statutory text is silent and unambiguous, courts can determine disestablishment based not on anything *Congress* said or anything the Executive Branch said, but based on academic professorial writings, demographics, and occasional, isolated snippets of equivocal and ambiguous legislative history. App., *infra*, 14a-22a.

That holding squarely conflicts with the law in the Second Circuit, which held in *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003), *rev'd on other grounds*, 544 U.S. 197

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[1] There is no dispute in this case that the Osage Reservation historically existed and was formally recognized by the federal government. *See* Act of June 5, 1872, 17 Stat. 228, 229.

(2005), that the 1838 Treaty of Buffalo Creek did not disestablish the Oneida Indian Nation of New York's reservation. *See also Oneida Indian Nation of New York v. Madison Cnty.*, 605 F.3d 149, 157 n.6 (2d Cir. 2010), *cert. granted*, No. 10-72 (Oct. 12, 2010).

Like the Tenth Circuit in this case, the Second Circuit found no indication in the Treaty's text or negotiation history "of a congressional intention to disestablish the Oneidas' New York reservation." *City of Sherrill*, 337 F.3d at 162. The difference is that the Second Circuit stopped there, holding that the absence of any clear direction in statutory text or negotiating history from Congress or from the Executive Branch foreclosed the court from declaring a reservation disestablished. *See id.* at 160 (noting that, in cases where Supreme Court has found diminishment, it has relied on "a textually grounded intention to diminish"). Directly contrary to the Tenth Circuit's decision here, the Second Circuit expressly refused to permit "certain legislative and administrative documents" postdating the treaty to substitute for the explicit and unequivocal congressional direction that this Court required in *Solem*. *Id.* at 162. Instead, "[g]iven the absence of anything in the Buffalo Creek Treaty's text or legislative history supporting disestablishment," the court "conclude[d] that these later documents do not 'unequivocally reveal' the intention necessary to demonstrate disestablishment." *Ibid.* (quoting *Solem*, 465 U.S. at 471). Accordingly, had the Osage case arisen in the Second Circuit and been governed by Second Circuit law, the outcome would have been exactly the opposite and the Osage Reservation

would not have been declared disestablished.

The Tenth Circuit's decision is also flatly contrary to the law in the Ninth Circuit. That court refused to find disestablishment in the absence of express language in the relevant agreement between the tribe and the United States, notwithstanding "a number of post hoc references to the 'former' reservation" in the record. *United States v. Webb*, 219 F.3d 1127, 1137 n.15 (9th Cir. 2000). Consistent with *Solem* – but in direct conflict with the Tenth Circuit's decision here – the court held that, "[e]ven if it were fully credited, the countervailing evidence at best creates an ambiguity as to congressional intent which would have to be resolved in favor of the tribe." *Ibid.* Here, by contrast, the Tenth Circuit found no ambiguity in statutory text and no unequivocal Executive Branch direction, but nevertheless allowed non-contemporaneous publications by professors, post hoc demographic statistics, and vague legislative history references both to create an ambiguity and then to resolve it against a tribe. The rules of law applied by the two circuits are thus irreconcilable.

Likewise, the law of the Eighth Circuit is the opposite of the Tenth Circuit's. The Eighth Circuit has held that, in the absence of evidence in the "historical and documentary record" that Congress intended to diminish a reservation, "we must conclude that at the time of the Act those lands retained * * * reservation status." *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1009 (8th Cir. 2010). While the court did look to evidence of congressional intent beyond the statutory text, it limited that inquiry to governmental documents

contemporaneous with the statute's enactment. *See id.* at 1008-1010. Importantly, the Eighth Circuit confined its consideration of non-textual evidence to bolstering an interpretation that was "reflect[ed]" in the legislation itself. *Id.* at 1009. That approach is incompatible with the reasoning of the Tenth Circuit, which rested its finding on modern-day academic and demographic sources in the absence of any contemporaneous evidence of disestablishment and any statutory indicia of disestablishment.

The conflict even reaches into the state court system. In *Yellowbear v. State*, the Wyoming Supreme Court concluded that the relevant statutory language – which included terms such as "cede, grant, and relinquish" – "[c]learly" evidenced a congressional intent to diminish the reservation at issue. 174 P.3d 1270, 1282 (Wyo. 2008). Only after making that determination did the court look to considerations external to the statute to confirm its understanding of Congress's intent. *See id.* at 1282-1284.

To be sure, the conflict in the circuits is not one-sided. The Seventh Circuit takes the same tack as the Tenth Circuit. In *Wisconsin v. Stockbridge-Munsee Community*, 554 F.3d 657 (7th Cir. 2009), the court found a reservation disestablished even though the relevant legislation "included none of the hallmark language suggesting that Congress intended to disestablish the reservation," *id.* at 664. Instead, the court relied entirely on legislative history statements and post-enactment evidence suggesting that the reservation had been treated "for the most part" as though it had been disestablished.

Id. at 665. Although the record was not uniform on that point, the court permitted atextual indicia both to create the ambiguity and to resolve that ambiguity in favor of disestablishment. *Ibid.*

Accordingly, this Court's review is needed to resolve that conflict in the law. When, as here, the legal standard prescribed by this Court requires "explicit[]" congressional direction, that standard necessarily demands a single uniform rule for identifying such explicit direction. But that is not what has happened. The law in this area now varies so substantially by geography that analysis of the same statutory text would produce polar opposite outcomes depending on the circuit in which the case arises or the land happens to lie. That disuniformity empowers courts to step in and make decisions that are constitutionally assigned to the Political Branches and to do so on legal bases that are unhinged from congressional or Executive Branch direction. Only this Court's review can restore the uniformity required by federal law and enforced by *Solem*.

II. THE COURT OF APPEALS' RULE THAT A RESERVATION CAN BE DISESTABLISHED WITHOUT EXPLICIT DIRECTION IN THE STATUTORY TEXT AND WITHOUT CONSIDERING THE EXECUTIVE BRANCH'S POSITION SQUARELY CONFLICTS WITH THIS COURT'S PRECEDENT

1. In *Solem*, this Court established a "fairly clean analytical structure" for determining whether a

reservation's boundaries had been diminished by an act of Congress, holding that Congress, and only Congress, "can divest a reservation of its land and diminish its boundaries. 465 U.S. at 470. Moreover, "[d]iminishment * * * will not be lightly inferred." *Ibid.* Rather, Congress's intent "must be 'clear and plain.'" *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (quoting *United States v. Dion*, 476 U.S. 734, 738-739 (1986). "The most probative evidence" of such intent is "[e]xplicit" statutory "reference to cession or other language evidencing the present and total surrender of all tribal interests." *Solem*, 465 U.S. at 470. When such express language is coupled with "an unconditional commitment from Congress to compensate the Indian tribe for its opened land," there is a "presumption" – although not a conclusive one – that Congress intended to diminish the reservation's boundaries. *Id.* at 470-471.[2]

The *Solem* rule concerning the primacy of statutory text is but one example of this Court's rule, applied consistently across many contexts, that clear statement requirements cannot be satisfied by references to extra-textual, second- and third-hand material. *See, e.g., Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 545 (2002) ("[G]eneral language * * * [is] insufficient to satisfy clear statement

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[2] Reservation "diminishment" refers to a shrinkage of the boundaries of a reservation, while "disestablishment" refers to the complete elimination of reservation boundaries. The same legal analysis applies to both terms. *See Yankton Sioux*, 522 U.S. at 358.

requirements."); *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 34 (1992) ("[T]he Government's consent to be sued 'must be construed strictly in favor of the sovereign, and not enlarge[d] . . . beyond what the language requires.'") (alteration and omission in original) (citation and some internal quotation marks omitted); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) ("[W]e have required an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'") (quoting *Quern v. Jordan*, 440 U.S. 332, 342 (1979).

To be sure, in the absence of explicit statutory language, the Court has occasionally looked to legislative history to confirm ambiguous statutory text. The Court has cautioned, however, that such reliance is proper only when contemporaneous legislative events – "particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress" – demonstrate "unequivocally" that Congress intended the legislation to disestablish or diminish the reservation. *Solem*, 465 U.S. at 471. The Court has also recognized the relevance to its analysis of the Executive Branch's "unambiguous" views. *Yankton Sioux*, 522 U.S. at 354; *see Solem*, 465 U.S. at 478 (noting contradictory treatment by the Executive).

This Court has made clear, moreover, that, "[w]hen both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands," courts must "rule that diminishment did not take

place and that the old reservation boundaries survived the opening." *Solem*, 465 U.S. at 472. That is because, under the Constitution, "Congress possesses plenary power over Indian affairs," and thus only Congress can disestablish a reservation. *Yankton Sioux*, 522 U.S. at 343. When Congress itself does not speak to the question of disestablishment, courts cannot interject a disestablishment decision of their own unanchored in text, unequivocal legislative history, or the expert interpretation of the Executive Branch. To rely on such materials to judicially interpolate a decision Congress never made is to take the decision out of Congress's hands. Simply put, Congress's power can be neither plenary nor politically accountable if courts are free to declare disestablishment based on non-legislative sources and without explicit legislative direction.[3]

2. The statutory text in this case expressly acknowledges the Reservation's continued existence. While the 1906 Osage Allotment Act, Pub. L. No. 59-321, 34 Stat. 539, 540 (1906), allotted the surface lands of the Osage Reservation, only Osage tribal members could receive land. In addition, Congress

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[3] While, on occasion, the Court has discussed events postdating the passage of the relevant legislation as confirming congressional intent, *Solem*, 465 U.S. at 471, the Court has made clear that such materials cannot themselves signal disestablishment. *See, e.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) (noting that "the context of the Act is not so compelling that, standing alone, it would indicate diminishment," but finding diminishment based on "the statute's plain terms").

granted the entire subsurface mineral estate in trust to the Nation as a whole.

As the court of appeals acknowledged, nothing in the 1906 Act's text supports a finding of disestablishment. Quite the opposite, the plain text of the Act repeatedly referred to the Osage "reservation" as continuing in existence. *See* 1906 Act § 4 (App., *infra*, 68a) (set aside from oil and gas royalties for "schools on the Osage Indian Reservation * * * conducted for the education of Osage children"); *id.* § 7 (App., *infra*, 70a) (requiring that leases and deeds for lands in the Reservation be subject to approval by the Secretary of the Interior); *id.* § 10 (App., *infra*, 71a) (permitting the establishment of public highways or roads "in the Osage Indian Reservation"); *id.* § 11 (App., *infra*, 71a) (allowing railroad companies to continue the use and benefit of certain lands "in the Osage Reservation"). The court of appeals' decision, rooted in history articles and statistics is thus at war with the plain statutory text.

Nothing in the balance of the Act's text overcomes that extensive language recognizing the Reservation's continuance. Certainly, the allotment process does not, because this Court "has repeatedly stated and Defendants have conceded that allotment/opening of a reservation alone does not diminish or terminate a reservation." App., *infra*, at 11a.

Other aspects of the 1906 Act, moreover, affirmatively support reservation status. First, rather than opening the Reservation for "the public

domain" as in *Hagen v. Utah*, 510 U.S. 399, 404 (1994), or requiring the payment of a sum certain for lands ceded by the Nation as in *Yankton Sioux*, the Act set aside certain lands for tribal purposes, thereby maintaining federal superintendence of the Reservation. Second, by restricting allotments to Osage members in trust so that they could not be leased or sold without federal approval, *see* Osage Act § 7 (App., *infra*, 70a), "the Act did not directly open the reservation to non-Indian settlement," and instead, it facilitated the maintenance of tribal cohesiveness. App., *infra*, at 14a. Third, the Act reserved tribal mineral resources in trust for the Nation as a whole, which Congress extended in perpetuity in 1978, dramatically demonstrating congressional intent to continue reservation status and federal superintendence for the protection of the Osage people.[4]

Against those powerful textual indicia of continued reservation status, the Act contains none of the express language of termination that is "[t]he most probative evidence" of Congress's intent to diminish a reservation. *Solem*, 465 U.S. at 470. And since the Act "did not open any land for settlement by

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[4] As if more were needed, this Court made clear in *Mattz v. Arnett* that by 1892, "Congress was fully aware of the means by which termination could be effected," 412 U.S. 481, 504 (1973), but failed to use such language. Indeed, in 1870, Congress demonstrated to the Osage how to terminate a reservation's boundaries when it expressly disestablished the Tribe's Kansas reservation, Act of July 15, 1870, ch. 296, § 12, 16 Stat. 335, 362, which included language of cession and sum certain. *Ibid.* No such language appears in the 1906 Act.

non-Osage, there is no sum-certain or any other payment arrangement in the Act." App., *infra*, at 14a. In short, the Act contains nothing approaching the "'clear and plain'" statement of congressional intent that is essential to a finding of diminishment. *Yankton Sioux*, 522 U.S. at 343. Quite the opposite, the court of appeals rightly recognized that the "operative language of the statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation." App., *infra*, 14a.

3. The silence of the statutory text should have been the end of the matter. Only Congress can disestablish the Osage Reservation, and Congress speaks through the laws it passes. When the text is silent, Congress has not "explicitly" disestablished anything. And courts cannot supplant that congressional judgment by invoking post hoc materials never considered by Congress or by isolating equivocal legislative history snippets.

Yet that is precisely what the Tenth Circuit (and the Seventh Circuit in *Stockbridge*) did. Faced with silent and unambiguous statutory text containing none of the recognized indicia of disestablishment, the Tenth Circuit relied on its perception of "the circumstances surrounding the passage of the act," professorial articles, and demographics. App., *infra*, at 14a.

In so ruling, the court of appeals departed sharply from *Solem*'s straightforward holding that legislative history can support disestablishment only if the statutory text is ambiguous and the legislative

history "*unequivocally* reveal[s] a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." 465 U.S. at 471 (emphasis added).

First, there is nothing ambiguous about the text of the Osage Act and thus nothing to construe by resort to legislative history.

Second, the only statements by members of Congress regarding the Osage Act relate to the allotment of tribal lands and monies. App., *infra*, at 15a-16a. None of the statements even mentions disestablishment of the Reservation, much less expresses an unequivocal intention to accomplish that result. The allotment of tribal property itself is "completely consistent with continued reservation status" and, in fact, the allotment policy was intended to "continue the reservation system and the trust status of Indian lands." *Mattz v. Arnett*, 412 U.S. 481, 496, 497 (1973); *see also, e.g.*, *Solem*, 465 U.S. at 470. Thus, whether or not a single legislator said that Congress needed "to bring about the allotment at the earliest possible time," is irrelevant, App., *infra*, at 16a, and says nothing about Congress's intention with respect to the Reservation's boundaries.

Third, with the exception of a single-sentence statement by a single Osage member opposed to the legislation, the court of appeals cited no contemporaneous statements from the Nation, its leadership, or any other members indicating their understanding that Congress intended to effect disestablishment through the Act. Moreover, the

statement of the single Osage member, which was read into the record through an interpreter, is itself strikingly ambiguous. App., *infra*, at 16a (citing 1 Division Hearings, at 6 (statement of Black Dog) ("Indians in Oklahoma living on their reservations who have had negotiations with the Government[,] since they have been compelled to take their allotments[,] they are not doing as well as the Indians who live on the reservations."). By treating that single cryptic sentence as relevant evidence of disestablishment – particularly in the absence of any statutory language or agency determination to that effect – the Tenth Circuit cast aside this Court's repeated direction that any atextual evidence of congressional intent must be "unequivocal," *Yankton Sioux*, 522 U.S. at 351; *Solem*, 465 U.S. at 471, and, necessarily, must reflect the views of *Congress* and not just of a private individual. *See Solem*, 465 U.S. at 478 ("a few phases scattered through the legislative history" cannot support disestablishment).

Fourth, the Tenth Circuit improperly relied on conclusory statements by historians decades removed from the passage of the Act as evidence of the "contemporaneous understanding" of the legislation's effect. *Solem*, 465 U.S. at 471; *see* App., *infra*, at 15a-18a. This Court has never rested a finding of disestablishment or diminishment on *post hoc* academic conjecture. And that is for good reason. If "the views of a subsequent *Congress* form a hazardous basis for inferring the intent of an earlier one," *Yankton Sioux*, 522 U.S. at 355 (emphasis added) (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348-349 (1963)), the views of

subsequent historians are an even more treacherous guide, especially when, as here, they replace (rather than just clarify) congressional direction.

The Tenth Circuit compounded that error by selectively relying on post-enactment demographic data as evidence of Congress's supposed intent decades earlier to disestablish the Reservation. Disestablishment is fundamentally a question of statutory construction; non-contemporaneous statistical studies simply have nothing to say about that. Indeed, this Court has decried such materials as an "unorthodox and potentially unreliable method of statutory construction," *Solem*, 465 U.S. at 472 n.13, and "the least compelling" of the *Solem* factors. *Yankton Sioux*, 522 U.S. at 356.[5]

4. In support of its conclusion that post-enactment non-governmental indicia support disestablishment, the Tenth Circuit relied on statements by a single, local Bureau of Indian Affairs superintendent referring to the land as a "former reservation." App., *infra*, at 20a. But this Court held in *Solem* that even a *congressional* reference to a "former" reservation will not suffice to effect disestablishment. 465 U.S. at 479.

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[5] At most, such data can be a third-hand tool for confirming – not replacing – statutory text and contemporaneous legislative history. *See, e.g.*, *Hagen v. Utah*, 510 U.S. 399, 420 (1994) ("[O]ur conclusion that the statutory language and history indicate a congressional intent to diminish is not controverted by the subsequent demographics of the Uintah Valley area."); *Yankton Sioux*, 522 U.S. at 351 (demographic data "not so compelling that, standing alone, it would indicate diminishment").

By the same token, the comment of a single regional official cannot hijack Congress's disestablishment authority, especially when they contradict the plain text of numerous federal statutes enacted between 1917 and 1942 referring specifically to the Osage Reservation in the present tense or otherwise reflecting Congress's intent to retain federal superintendence over the Reservation. Indeed, this Court has held that "Congress's own treatment of the affected areas * * * has some evidentiary value." *Solem*, 465 U.S. at 471; *see, e.g.*, 25 U.S.C. § 398 (1924) (providing for the leasing of unallotted land on Indian reservations "other than lands of the Five Civilized Tribes and the Osage Reservation"); 25 U.S.C. § 396f (1938) (excepting from certain leasing provisions "the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma"); 25 U.S.C. § 373c (1942) (excepting certain probate procedures from the "Five Civilized Tribes or the Osage Reservation"); Reaffirmation Act of 2004, Pub. L. No. 108-431; Osage C.A. Br. 31, 36 & n.14 (citing statutes).

Nor, under this Court's precedent, can it trump the views of higher-level Executive Branch officials. *See, e.g.*, *Hagen*, 510 U.S. at 417-418. The Department of the Interior has consistently and from the earliest days of the Reservation administered its statutory duties and performed trust obligations consistent with the Osage Reservation's continued recognized existence. For example, the Solicitor of Interior issued an opinion in 1935 in conjunction with a murder investigation and prosecution on the Osage

Reservation that, for purposes of jurisdiction, the lands in question "may be regarded as within the limits of the Indian reservation" and that "[s]o far as I am advised no act of Congress has severed these lands from the reservation. In the absence of such Congressional action the lands not only remain with the reservation but also qualify as 'Indian country' under the rule that 'Indian country' remains such until the Indian title is extinguished unless other wise [sic] provided by Congress." Memorandum to the Commission of Indian Affairs from Nathan R. Margold, Solicitor, 1 Opinions of the Solicitor 591-92 (December 17, 1935); *see also* C.A. App. 170 (Letter from Penny J. Coleman, National Indian Gaming Commission, to Richard Meyers, Dep't of Interior (July 28, 2005), quoting Letter from Harold D. Cox, Associate Commission for Support Services, to Senator Henry Vellman (Mar. 9, 1971) ("[i]n reviewing the situation, we have not found any Act of Congress which expressly or otherwise terminated the reservation status or operated to remove the boundaries thereof"); C.A. App. 184 (Letter to Honorable Robert S. Kerr, Jr. from Tim Vollman, Regional Solicitor (Feb 15, 1994) (advising the Oklahoma Water Resources Board that it "has no jurisdiction or authority to adjudicate the rights of the Osage Tribe to use the water appurtenant to its reservation")).[6]

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[6] Contrary to the court of appeals' conclusion, App., *infra*, 20a, the isolated statements in the regional reports suggesting that state and county officials had "primar[y]" law enforcement responsibilities within the territory during a given period, are wholly inadequate to resolve the jurisdictional question. *See*

Recently, Interior has been called upon to administer and enforce federal liquor laws based upon its formal position regarding the continued existence of the Reservation. For example, the Assistant Secretary for Indian Affairs certified the Osage Tribe Liquor Control Ordinance, and published the ordinance in the Federal Register, 70 Fed. Reg. 3054 (Jan. 19, 2005), pursuant to 18 U.S.C. § 1161. Section 4 of the Nation's ordinance approved by Interior states: "The Osage Tribal Council, as the sole governing body of the Osage Tribe of Indians, hereby affirmatively declares, asserts, and extends the jurisdiction of the Osage Tribe over the Osage Indian Reservation and all Indian country, as defined in 18 U.S.C. § 1151, *within the exterior boundaries of the Osage Indian Reservation, as described in the Act of June 5, 1872*." 70 Fed. Reg. at 3055.

Moreover, Interior recently approved a Tribal-State Gaming Compact, as it is required to do pursuant to federal law, between the Osage Nation and the State of Oklahoma. 70 Fed. Reg. 13535 (Mar. 21, 2005). The Compact authorizes the Nation to conduct gaming on its Indian lands, as defined by IGRA, *see infra* p. 26 n.7, which include "all lands within the limits of any Indian reservation." 25 U.S.C. § 2703(4). Since 2005, the Nation has operated gaming operations on parcels of fee land within the boundaries of the Osage Reservation, in

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Solem, 465 U.S. at 465 n.2 & 479 n.23 (noting the law enforcement roles States can exercise on Indian land and citing a study indicating that "Federal, Tribal, and State courts shared jurisdiction over the opened areas in the decades following opening").

accordance with the Gaming Compact. From 2005 through January 2009, the Nation remitted to the State of Oklahoma revenue sharing payments and fees for gaming on fee land totaling $4,235,204.00. C.A. App. 412.

Finally, maps produced by the Department of the Interior and the U.S. Geological Survey depict the Osage Reservation as the only Indian reservation in Oklahoma. App., *infra*, 72a. Some maps not only represent the continued existence of the Osage Reservation, but depict every other tribe in Oklahoma as "Federal Indian Groups Without Reservation." *See* U.S. Geological Survey, Indian Lands 1992, *available at* https://store.usgs.gov/yimages/PDF/101502.pdf (last visited Oct. 21, 2010).

Interior is not alone. The National Indian Gaming Commission ("Commission") is a federal agency charged by Congress with regulating Indian gaming and, if necessary, enforcing the statute against a tribe or gaming management company that may be operating in violation of federal law.[7] When questions arise regarding whether the conduct of Indian gaming is occurring on gaming eligible Indian lands, the government's position on the status of an Indian reservation is critically important and often dispositive.[8] In fulfillment of this statutory duty, the

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[7] The NIGC was created by Congress pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("IGRA") to regulate Indian gaming activity on Indian land.

[8] The IGRA provides, among other things, that tribal gaming is lawful if conducted on the statutorily defined term

Commission issued an opinion letter concluding that the Osage Nation may conduct gaming on certain parcels of fee land in North Tulsa, Oklahoma, because "they lie within the Tribe's reservation." C.A. App. 166. The opinion is based on historical documents and official records from Interior acknowledging that the Osage Reservation boundaries have not been disestablished.

In addition, the Commission separately approved the Nation's gaming ordinance authorizing gaming activities to be conducted on the Nation's Indian lands as defined by IGRA. *See* Letter from Philip N. Hogen, National Indian Gaming Comm'n, to Chief James R. Gray, *et al.* (Feb. 27, 2007), *available at* www.nigc.gov/Portals/0/NIGC%20Uploads/ReadingRoom/gamingordinances/osagenation/osageordamend022707.pdf (last visited Oct. 21, 2010); 25 U.S.C. § 2703(4) (defining Indian lands as "all lands within the limits of any Indian reservation . . . .").

Third, the United States has taken a formal litigation position in *Osage Nation v. United States*, currently pending in the United States Court of Federal Claims, that the Osage Reservation was not disestablished. Department of Justice and Interior attorneys entered into Stipulations of Fact with the Nation that set forth that "[t]he Osage Reservation is located in northern Oklahoma. The Reservation covers roughly 1.47 million acres. The boundaries of the Osage Reservation are co-extensive with the

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"Indian lands," which in most cases means land within a Tribe's reservation boundaries.

boundaries of present-day Osage County, Oklahoma." C.A. App. 176. This stipulated fact was adopted by the Court on September 21, 2006.

The Tenth Circuit, however, completely ignored that extensive and longstanding congressional and Executive Branch recognition of the continued existence of the Osage Reservation. Indeed, the court's legal test gave far greater weight to the views of private scholars and statisticians, App., *infra*, 15a-18a; 21a-22a, than it did to the four federal statutes and longstanding views of two expert federal agencies. That makes no sense. Under *Solem*, only Congress's words can disestablish a reservation, yet the Tenth Circuit leaves no room in its legal standard for what Congress said four times, and thus its test bears no resemblance to this Court's rule that congressional intent is dispositive. Nor does the Tenth Circuit's test factor in the formal position of agencies charged by Congress with administering the relevant laws, unlike *Solem* and *Yankton Sioux*.

This Court's review thus is needed because the court's decision defies Congress's repeated recognition in numerous statutes of the Osage Reservation's continued existence. In addition, federal agencies need a single, consistent answer to whether and when a reservation, like the Osage's, has been disestablished so that they can carry out their important federal responsibilities. For example, the Department of Interior provides services directly, or through contracts, grants or compacts, to 564 federally recognized tribes with a combined service population of approximately 1.9 million American Indians and Alaska Natives in nearly every state.

Moreover, programs administered on scores of Indian reservations throughout the country by Interior include social services, law enforcement and detention services, and natural resources management on 55 million acres of trust lands and 57 million acres of subsurface minerals estates. Commonly, the proper administration of these programs depends upon Interior's official position regarding the status of the Indian reservation where the program is to be applied. But the status of the Osage's Reservation is now unsettled, with the court of appeals on the one hand, and Congress and the Executive Branch on the other providing different answers.

III. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING

The questions presented in this case are fundamental to the United States' relationship with Indian tribes and, more importantly, the United States' ability to carry out its federally mandated trust relationship with the Osage Nation and other tribes. *See Yankton Sioux*, 522 U.S. at 357 (noting the "present-day understanding of a 'government-to-government relationship between the United States and each Indian tribe'") (quoting 25 U.S.C. § 3601). The Tenth Circuit's divergence from this Court's precedent and inconsistency with other circuits will wreak havoc on the congressionally designated agencies' ability to consistently carry out their duties and uphold their fiduciary responsibilities to Indian tribes throughout the country.

Furthermore, questions of reservation diminishment and disestablishment are recurring

and important. They have arisen in federal courts of appeals and state courts of last resort across the Country, with three decisions addressing disestablishment issued by three different courts of appeals in 2010 alone. *See* App., *infra*, 3a; *Yellowbear, supra*; *Podhradsky, supra*. Such decisions are vitally important, moreover, directly affecting the day-to-day operations of federal, state, local, and tribal agencies.

In fact, this Court's recent grant of certiorari in *Madison County v. Oneida Indian Nation*, 79 USLW 3062 (U.S. Oct. 12, 2010) (No. 10-72), confirms the importance of the question. There, this Court granted review to address, *inter alia*, whether the Oneida reservation in New York was disestablished. Petition for Writ of Certiorari at i, *Madison Cnty. v. Oneida Indian Nation*, No. 10-72 (U.S. July 9, 2010). That grant of certiorari reflects the importance of such disestablishment questions.

It also reinforces the need for review in this case for two reasons. First, it is not at all clear that this Court will find it necessary to address the disestablishment question in that case, since the issue is presented only secondarily and was not decided by the court of appeals in that case, 605 F.3d at 157 n.6. Second, even if the Court were to reach that question, it is narrowly confined to evaluating factually the status of the Oneida reservation. This case, by contrast, presents an overarching legal question about the proper standard for holding that a reservation has been disestablished that cuts across many States and virtually all tribes.

In the alternative, this petition should be held pending this Court's disposition of *Madison County*, with the appropriateness of certiorari taken under review following the Court's decision in that case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending this Court's decision in *Madison County v. Oneida Indian Nation*, 79 USLW 3062 (U.S. Oct. 12, 2010) (No. 10-72), and disposed of as appropriate following this Court's decision in that case.

Respectfully submitted,

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APPENDIX

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APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OSAGE NATION, Plaintiff- Appellant, v. CONSTANCE IRBY, Secretary- Member of the Oklahoma Tax Commission, et al., Defendants- Appellees.	No. 09-5050
OKLAHOMA FARM BUREAU, et al., Amici Curiae.	

ORDER

Before **TACHA**, **EBEL**, and **KELLY**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

ELISABETH A. SHUMAKER,
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

OSAGE NATION,

Plaintiff - Appellant,

v.

CONSTANCE IRBY Secretary - Member of the Oklahoma Tax Commission; THOMAS E. KEMP, JR., Chairman of the Oklahoma Tax Commission; JERRY JOHNSON, Warden, Vice-Chairman of the Oklahoma Tax Commission,

Defendants - Appellees.

No. 09-5050

OKLAHOMA FARM BUREAU; OKLAHOMA CATTLEMEN'S ASSOCIATION; OSAGE COUNTY FARM BUREAU; OSAGE COUNTY CATTLEMEN'S ASSOCIATION; OKLAHOMA ASSOCIATION OF

ELECTRIC COOPERATIVES; OKLAHOMA INDEPENDENT PETROLEUM ASSOCIATION; OKLAHOMA MUNICIPAL LEAGUE; OKLAHOMA RURAL WATER ASSOCIATION; OKLAHOMA WILDLIFE MANAGEMENT ASSOCIATION; ENVIRONMENTAL FEDERATION OF OKLAHOMA; PUBLIC SERVICE COMPANY OF OKLAHOMA; OKLAHOMA STATE CHAMBER OF COMMERCE AND INDUSTRY,

Amici Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 4:01-CV-00516-JHP-FHM)

Thomas P. Schlosser of Morisset, Schlosser & Jozwiak, Seattle, Washington (and Gary S. Pitchlynn, O. Joseph Williams and Stephanie Moser

Goins of Pitchlynn & Williams, P.L.L.C., Norman Oklahoma, with him on the briefs), for Plaintiff - Appellant.

Lynn H. Slade, (William C. Scott and Joan D. Marsan of Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, New Mexico; Kathryn L. Bass, Chief Deputy General Counsel, Oklahoma Tax Commission, Oklahoma City, Oklahoma, on the brief), for Defendants - Appellees.

Steven W. Bugg and Jeff L. Todd of McAfee & Taft A Professional Corporation, Oklahoma City, Oklahoma, for Amici Curiae.

Before **TACHA, EBEL,** and **KELLY,** Circuit Judges.

KELLY, Circuit Judge.

Plaintiff-Appellant the Osage Nation ("the Nation") appeals from the grant of summary judgment for Defendants-Appellees. The Nation sought (1) a declaratory judgment that the Nation's reservation, which comprises all of Osage County, Oklahoma, has not been disestablished and remains Indian country within the meaning of 18 U.S.C. § 1151; (2) a declaratory judgment that Nation members who are employed and reside within the reservation's geographical boundaries are exempt from paying state income tax; and (3) injunctive relief prohibiting Defendants from collecting income tax from such tribal members. 1 Aplt. App. at 24.

The pivotal issue in this case is whether the Nation's reservation has been disestablished, not Oklahoma's tax policies. The district court held that the Osage reservation had been disestablished; that tribal members who work and live on non-trust/non-restricted land in Osage County are not exempt from state income tax; and that "[t]he Osage have not sought to reestablish their claimed reservation or to challenge [Oklahoma's] taxation until recently," and Oklahoma's longstanding reliance counsels against now establishing Osage County as a reservation. 2 Aplt. App. at 389-407. The district court also denied the Nation's Rule 59 motion. 2 Aplt. App. at 416. On appeal, the Nation argues that its reservation has never been disestablished and is coterminous with Osage County; that tribal members who work and live in Osage County are exempt from state income tax; and that the district court should not have applied equitable considerations to this case. Our jurisdiction arises under 28 U.S.C. § 1291, and because we agree that the Osage reservation has been disestablished, we affirm.

Background

In 1872, Congress established a reservation for the Osage Nation in present day Oklahoma. See Act of June 5, 1872, ch. 310, 17 Stat. 228 (An Act to Confirm to the Great and Little Osage Indians a Reservation in the Indian Territory). In 1887, due to increased demand for land by white settlers and a desire to assimilate tribal nations, Congress passed the Indian General Allotment Act. *See* Act of February 8, 1887, ch. 119,24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348-

349, 354, 381). The Osage reservation was expressly exempted from this Act. 25 U.S.C. § 339. In 1907, Oklahoma became a state, and the Osage reservation was incorporated into the new state as Osage County as provided for in the Oklahoma Enabling Act. *See* Act of June 16, 1906, ch. 3335, 34 Stat. 267, §§ 2, 21: *see also* Okla. Const., art. XVII, § 8 ("The Osage Indian Reservation with its present boundaries is hereby constituted one county to be know as Osage County."). Osage County, the largest county in Oklahoma, covers about 2,250 square miles (about 3% of Oklahoma's total land area).

Contemporaneous to passing the Oklahoma Enabling Act, Congress enacted the Osage Allotment Act. *See* Act of June 28, 1906, ch. 3572, 34 Stat. 539. The 1906 Osage Allotment Act severed the mineral estate from the surface estate of the reservation and placed it in trust for the tribe. *Id.* at §§ 2-3. The Act included several provisions regarding tribal government and tribal membership and granted the Osage tribal council general tribal authority. *See Logan v. Andrus*, 640 F.2d 269, 270 (10th Cir. 1981) (noting that nothing in the Osage Allotment Act "limited the authority of the officers therein named to mineral administration or any other specific function"). The Act also allotted most of the Osage surface land in severalty to tribal members. Osage Allotment Act at § 2.

In 2004, Congress passed a statute clarifying the 1906 Act and authorizing the Osage Nation to determine its membership and government structure. Pub. L. No. 108-431, 118 Stat. 2609 (2004) (An Act to Reaffirm the Inherent Sovereign Rights of the Osage

Tribe to Determine Its Membership and Form of Government). This Act refers to the Osage as "based in Pawhuska, Oklahoma," *id.* at § 1, but does not specifically refer to an Osage reservation in the text of the statute, and does not address the reservation status of Osage land.

In 1999, a tribal member who was employed by the Tribe on trust land and lived within the boundaries of the Osage County on fee land protested the State's assessment of income tax on her. *Osage Nation v. Oklahoma ex rel. Okla. Tax Comm'n*, 260 F. App'x 13, 15 (10th Cir. 2007). The Oklahoma Tax Commission determined that she did not live in Indian country within the meaning of 18 U.S.C. § 1151, and that her income was taxable. *Id.* After the Commission's decision, the Osage Nation filed the instant suit seeking declaratory and injunctive relief. *Id.* at 15-16. Specifically, the Nation seeks a declaratory judgment: "(1) that the Nation's reservation boundaries have not been extinguished, disestablished, terminated, or diminished and is and remains the Indian country of the Nation; and (2) that the Nation's members who both earn income and reside within the geographical boundaries of the Nation's reservation are not subject to or required to pay taxes to the State . . . on [] income." 1 Aplt. App. at 24. The Nation further seeks injunctive relief prohibiting "Defendants . . . from levying or collecting Oklahoma state income taxes upon the income of the Nation's members who both earn income and reside within the geographical boundaries of the Nation's reservation." 1 Aplt. App. at 24.

The state of Oklahoma and the Oklahoma Tax Commission filed a motion to dismiss, arguing that the Nation's suit was barred by the Eleventh Amendment. *Osage Nation*, 260 F. App'x at 16. The Nation amended the complaint to include the individual members of the Tax Commission as defendants. *Id.* All of the defendants again moved to dismiss based on Eleventh Amendment immunity, and the district court denied the motion, *Id.* On appeal, we reversed the district court's decision to allow the suit to proceed against the State of Oklahoma and the Oklahoma Tax Commission. We determined that the suit could proceed against the individual members of the Tax Commission under the *Ex parte Young* exception to Eleventh Amendment immunity. *Id.* at 22.

On remand, the remaining defendants moved to dismiss, and the district court converted their motion to one for summary judgment. 1 Aplt. App. at 204. The district court determined that "the Osage reservation ceased to exist more than a century ago," 2 Aplt. App. at 389, and that tribal members that work and live on private fee lands in Osage County are not exempt from state income tax, 2 Aplt. App. at 397-02. Applying *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 214 (2005), the district court also held that federal equity practice precludes the Nation from advancing its claims after Oklahoma has governed Osage County for over a hundred years. 2 Aplt. App. 405-07.

DISCUSSION

It is well established that Congress has the power to diminish or disestablish a reservation unilaterally, although this will not be lightly inferred. *See, e.g.*, *Solem v. Bartlett*, 465 U.S. 463, 470, 472 (1984). Congress's intent to terminate must be clearly expressed, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998), and there is a presumption in favor of the continued existence of a reservation, *Solem*, 465 U.S. at 472. Courts may not "'ignore plain language that, viewed in historical context and given a fair appraisal clearly runs counter to a tribe's later claims.'" *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1393 (10th Cir. 1990) (quoting *Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985)).

We have noted that "the Supreme Court has applied, without comment, a *de novo* standard of review in determining congressional intent [regarding reservation boundary diminishment]." *Yazzie*, 909 F.2d at 1393 (listing cases). While determining congressional intent is a matter of statutory construction, which typically involves a de novo review, to the extent that statutory construction turns on an historical record, it involves a mixed question of law and fact. *Id.* "Where a mixed question primarily involves the consideration of legal principles, then a *de novo* review by the appellate court is appropriate." *Id.* at 1393-94 (internal quotation marks and citation omitted).

We apply the three-part test summarized in *Solem* to determine whether a reservation has been

diminished or disestablished. Congress's intent at the time of the relevant statute governs our analysis. The Supreme Court has repeatedly stated and Defendants have conceded that allotment/opening of a reservation alone does not diminish or terminate a reservation. Aplee. Br. at 18. In ascertaining Congress's intent, the effect of an allotment act depends on both the language of the act and the circumstances underlying its passage. *Solem*, 465 U.S. at 469. The "operative" language of the statute carries more weight than incidental language embedded in secondary provisions of the statute. *Id.* at 472- 76. The Court will infer diminishment or disestablishment despite statutory language that would otherwise suggest unchanged reservation boundaries when events surrounding the passage of [the] act "unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Id.* at 471. In addition to (1) explicit statutory language and (2) surrounding circumstances, the Court looks to (3) "subsequent events, including congressional action and the demographic history of the opened lands, for clues to whether Congress expected the reservation boundaries to be diminished." *Yazzie*, 909 F.2d at 1395. Such latter events will not govern if "an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands . . . ." *Solem*, 465 U.S. at 472. Thus, "subsequent events and demographic history can support and confirm other evidence but cannot stand on their own; by the same token they cannot undermine substantial and compelling evidence from

an Act and events surrounding its passage." *Yazzie*, 909 F.2d at 1396.

With these standards in mind, we turn to whether the 1906 Osage Allotment Act disestablished the Osage reservation.

A. *Statutory Language*

Statutory language is the most probative evidence of congressional intent to disestablish or diminish a reservation. "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Solem*, 465 U.S. at 470. Examples of express termination language include: "'the Smith River reservation is hereby discontinued,'" *Mattz v. Arnett*,412 U.S. 481, 505 n.22 (1973) (discussing 15 Stat. 221 (1868)); "'the same being a portion of the Colville Indian Reservation ... be, and is hereby, vacated and restored to the public domain,'" *id.* (discussing 27 Stat. 63 (1892)); "'the reservation lines of the said Ponca and Otoe and Missouria Indian reservations . . . are hereby, abolished,'" *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 618 (1977) (discussing 33 Stat. 218 (1904)); "'the . . . Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest,'" *DeCoteau v. District County Court*, 420 U.S. 445, 455-56 (1975) (discussing Agreement of 1889, ratified by 26 Stat. 1035 (1891)). An act's language is not sufficient evidence of an intent to terminate a reservation when it simply opens the way for non-Indians to own land on the reservation –

e.g., making reservation lands "'subject to settlement, entry, and purchase.'" *Mattz,* 412 U.S. at 495, 497; *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356 (1962). Likewise, language authorizing the Secretary of the Interior to "sell and dispose" of reservation land is insufficient to terminate a reservation. *Solem*, 465 U.S. at 472-73.

The manner in which a statute compensates a tribe for opened land is also instructive. Some statutes provide that the tribe will be paid a sum-certain amount as compensation for all of the unallotted land. Others provide payment to the tribe as the lands are sold. Sum-certain payments indicate an intent to terminate the reservation, but payment that is contingent on future sales usually indicates an intent not to terminate. *Compare DeCoteau*, 420 U.S. 425 (holding that the reservation was terminated where there was express language regarding termination, a sum-certain payment, and tribal consent to the agreement) *with Mattz*, 412 U.S. 481 (holding that the reservation was not terminated where there was no express language regarding termination nor a sum-certain payment).

Explicit language signifying an intent to terminate a reservation combined with a sum-certain payment creates "an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Solem*, 465 U.S. at 470-71.

The *Solem* court found additional factors weighing in favor of continued reservation status: (a) authorization for the Secretary of the Interior to set

aside lands for tribal purposes; (b) permission for tribal members to obtain individual allotments before the land was officially opened to non-Indian settlers; and (c) reservation of the mineral resources for the tribe as a whole. 465 U.S. at 474. All three of these factors are present in the Osage Allotment Act. Unlike other allotment acts, the Act did not directly open the reservation to non-Indian settlement. With the exception of certain parcels of trust land reserved for the Osage Nation, the Act allotted the entire reservation to members of the tribe with no surplus lands allotted for non-Indian settlement. As the Act did not open any land for settlement by non-Osage, there is no sum-certain or any other payment arrangement in the Act. And neither the Osage Allotment Act nor the Oklahoma Enabling Act contain express termination language. Thus, the operative language of the statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation.

B. *Circumstances Surrounding Passage of the Act*

If the statute is ambiguous, we turn to the circumstances surrounding the passage of the act, in particular the manner in which the transaction was negotiated and its legislative history, for evidence of a contemporaneous understanding that the affected reservation would be diminished or disestablished as a result of the proposed legislation. *Solem*, 465 U.S. at 471. The Court sometimes considers whether there was tribal consent. *Compare DeCoteau*, 420 U.S. at 448 (the reservation was found to have been terminated, and the Court found importance in the

fact that the tribe consented to the agreement) *with Rosebud Sioux*, 430 U.S. at 587 (the reservation was disestablished although there was no tribal consent).

The manner in which the Osage Allotment Act was negotiated reflects clear congressional intent and Osage understanding that the reservation would be disestablished. The Act was passed at a time where the United States sought dissolution of Indian reservations, specifically the Oklahoma tribes' reservations. See Francis Paul Prucha, The Great Father 737-57 (1984) (Aplee. Supp. Add. 104-24). In preparation for Oklahoma's statehood, the Dawes Commission had already implemented an allotment process with the Five Civilized Tribes that extinguished national and tribal title to lands within the territory and disestablished the Creek and other Oklahoma reservations. *See* H.R. Rep. No. 59-496, at 9, 11 (1906) (Aplee. Supp. Add. at 28, 30). While the Osage were excepted from the Dawes Commission process, the Osage felt pressure having observed the Commission's activities with respect to other tribes, and "[for several years, the Osage . . .ha[d] been considering the question of asking the Government to divide its lands and moneys among the members of the tribe." S. Rep. No. 59-4210, at 1 (1906) (Aplee. Supp. Add. at 42). In 1905, the Osage approached Congress to begin negotiating a bill "to abolish their tribal affairs and to get their lands and money fairly divided, among themselves, so that every individual will be there to give his views in the matter, and the majority agree upon a plan." 1 Division of the Lands and Moneys of the Osage Tribe of Indians: Hearings on H.R. 17478 Before the H. Subcomm. of the Comm. on Indian Affairs, 58th Cong. 8 (1905) ("Division

Hearings") (Aplt. Add. at 9). The Osage were "very anxious to bring about the allotment at the earliest possible time." 40 Cong. Rec. 3581 (1906) (Statement of Sen. Dillingham) (Aplee. Supp. Add. at 51). Congress and the Osage recognized that allotment may result in loss of much of the tribal land. *See, e.g.*, W. David Baird, The Osage People 68 (1972) (2 Aplt. App. at 237) ("James Bigheart and Black Dog, for example, noted that, like Indians of other tribes, the Osage may very well lose their allotments after dissolution of the reserve."). The Osage also recognized that the allotment process would terminate reservation status. 1 Division Hearings, at 6 (Aplt. Add. at 12) (statement of Black Dog, Osage Representative) ("Indians in Oklahoma living on their reservations who have had negotiations with the Government[,] since they have been compelled to take their allotments[,] they are not doing as well as the Indians who live on the reservations.")

The Osage themselves presented an allotment act to Congress in February 1906, and by June of that year, Congress passed the Osage Allotment Act. Baird at 70 (2 Aplt. App. at 238). A primary concern during the negotiations was a desire to ensure that some tribal members were not unfairly enriched at the expense of other tribal members. These concerns were addressed by allotting land in several rounds, severing the mineral estate and placing it in trust for the tribe, and providing for a form of tribal government. *See, e.g.*, 1 Division Hearings, at 11-14, 55-56 (Aplt. Add. at 17-20, 54-55); Osage Allotment Act at §§ 2, 3, & 9. The Osage tried to prevent their land from becoming alienable through certificates of competency, but Congress rejected this approach. *See*

2 Division Hearings, at 4 (Aplt. Add. at 59). They also attempted to prevent a large portion of their lands, the surplus lands, from being taxed; this was also rejected by Congress. S. Rep. No. 59-4210, at 8 (Aplee. Supp. Add. at 49).

The legislative history and the negotiation process make clear that all the parties at the table understood that the Osage reservation would be disestablished by the Osage Allotment Act, and uncontested facts in the record provide further evidence of a contemporaneous understanding that the reservation had been dissolved. Historian Lawrence Kelly concludes that "[t]reatises and articles in professional journals that have considered the history of the former Osage Reservation have acknowledged that, after the Osage Allotment Act and Oklahoma's admission to the Union in accordance with the Oklahoma Enabling Act. the Osage Reservation no longer existed and that area became Osage County, a subdivision of the State of Oklahoma." Kelly Aff., ¶ 10 (2 Aplt. App. 244). Historian Francis Prucha has thoroughly discussed the United States' persistent efforts to end tribal control in the Indian Territory, which eventually became part of Oklahoma. Prucha at 738-57 (Aplee. Supp. Add. at 105-24). He notes, "The Indians of Oklahoma were an anomaly in Indian-white relations. . . . There are no Indian reservations in Oklahoma. . . . [T]he reservation experience that was fundamental for most Indian groups in the twentieth century was not part of Oklahoma Indian history." Prucha at 757 (Aplee. Supp. Add. at 124). Another historian, Berlin Chapman, states that while Congress had established many reservations before

Oklahoma's statehood, "[t]he last of these reservations to be dissolved by allotments was that owned and occupied by the Osage[], embracing about 1,470,059 acres, now comprising Osage county." Berlin B. Chapman, *Dissolution of the Osage Reservation*, 20 Chrons. Okla. 244, 244 (1942) (1 Aplt. App. at 98). Historian W. David Baird concurs, stating "[w]ith their land allotted and their reserve an Oklahoma county . . . [the Osage] no longer existed as an independent people." Kelly Aff.,¶ 10 (2 Aplt. App. at 244) (quoting Baird at 72).

Instead of presenting evidence regarding widely held understanding of the Osage Allotment Act at the time it was passed, the Osage Nation primarily presents evidence of continued existence of their reservation contemporaneous to this litigation including: (1) the legislative history of the 2004 Osage Act, which refers to the Osage as a "federally recognized tribe with a nearly 1.5 million-acre reservation in northeast Oklahoma," H.R. Rep. No. 108-502, at 1 (2004); (2) the Assistant Secretary for Indian Affairs' certification of an Osage Tribe Liquor Control Ordinance in 2005, Aplt. Add. at 95-100; (3) a 2005 National Indian Gaming Commission opinion letter concluding that certain parcels of fee land in Osage County are part of the tribe's reservation, 1 Aplt. App. at 166-72; (4) a 1997 gubernatorial proclamation declaring October 25, 1997 as "Osage Day," 1 Aplt. App. at 174; (5) the 2005 compact between the Osage Nation and the state of Oklahoma authorizing the Nation to conduct gaming on its "Indian lands" which has resulted in the operation of casinos on fee lands in Osage County, Aplt. Add. at 101-03; (6) the Osage Nation's compacts with the

state regarding sharing of revenue from gaming activity and cigarette sales, Atkinson Aff. (2 Aplt. App. at 411-12); Mashunkashey Aff. (2 Aplt. App. at 414-15); (7) a "reservation" sign on a state highway, 1 Aplt. App. at 141; and (8) a map by the Dept. of the Interior and the U.S. Geological Survey depicting the boundaries of an Osage reservation as Osage County, 1 Aplt. App. at 182. Such evidence is too far removed temporally from the 1906 Act to shed much light on 1906 Congressional intent. *See, e.g., Hagen v. Utah*, 510 U.S. 399, 420 (1994) (subsequent legislative record "is less illuminating than the contemporaneous evidence" because it does not contain "'deliberate expressions of informal conclusions about congressional intent [at the time of enactment]'").

C. *Post-enactment History*

The final factor used to determine Congressional intent to disestablish is subsequent events. Actions by Congress, the Bureau of Indian Affairs (BIA), and local authorities with regard to the unallotted open lands, "'particularly in the years immediately following the opening, ha[ve] some evidentiary value." *Solem*, 465 U.S. at 471. Express recognition of the continued existence of specific reservations by Congress in subsequent statutes, of course, supports the continued existence of a reservation. *See e.g., Seymour*, 368 U.S. at 356 (citing statues enacted 50 years after allotment); *Mattz*, 412 U.S. at 505. In contrast, a state's unquestioned exertion of jurisdiction over an area and a predominantly non-Indian population and land use supports a conclusion of reservation disestablishment. *Rosebud Sioux*, 430

U.S. at 604-05 ("The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use . . . demonstrates the parties' understanding of the meaning of the Act."). The Court has also explicitly focused on population demographics, noting that "[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." *Solem*, 465 U.S. at 471 (acknowledging that this was an "unorthodox and potentially unreliable method of statutory interpretation," 465 U.S. at 472 n.13, but admitting a desire that the result be in some general conformance with the modern day balance of the area demographics, *id.* at 472 n.12).

The uncontested facts support disestablishment under this prong of the *Solem* test. After enactment, federal officials responsible for the Osage lands repeatedly referred to the area as a "former reservation" under state jurisdiction. For example, an annual report from the Superintendent to the Commissioner of Indian Affairs notes that his office "has experienced no difficulty maintaining order . . . . This duty, of course, falls to the County and State Officials." 2 Aplt. App. at 259 (1916 report); *see also* 2 Aplt. App. at 263 (1919 report) (same); 2 Aplt. App. at 268 (1920 report) ("Osage County, formerly Osage Indian Reservation, is organized under the constitution of the State of Oklahoma and the duty of maintaining order and enforcing the law is primarily in the hands of the County officials."); 2 Aplt. App. at 272 (1921 report) (same); 2 Aplt. App. at 276 (1922

report) (same). Such "'jurisdictional history' . . . demonstrates a practical acknowledgment that the Reservation was diminished." *Hagen*, 510 U.S. at 421. *Compare Solem*, 465 U.S. at 480 (not finding diminishment where "tribal authorities and Bureau of Indian Affairs personnel took primary responsibility for policing . . . the opened lands during the years following [the opening in] 1908") *with Hagen*, 510 U.S. at 421 (finding diminishment where "[t]he State of Utah exercised jurisdiction over the opened lands from the time the reservation was opened").

In addition, uncontested population demographics demonstrate a dramatic shift in the population of Osage County immediately following the passage of the Osage Allotment Act. From the 1907 Special Census following the founding of Oklahoma to the 1910 Census, Osage County's population grew by a third. Glimpse Aff., ¶ 9 (2 Aplt. App. at 307-08); 2 Aplt. App. at 319-29 (census data for 1907, 1910, 1920, and 1930). By 1910, Osage Indians represented roughly six percent of the Osage County population. Glimpse Aff., ¶ 9 (2 Aplt. App. at 307- 08). From 1910 to 1920, the county's population grew by 82%, but the Indian population in the county (not limited to Osage Indians) dropped to roughly 3 percent. Glimpse Aff.,¶ 10 (2 Aplt. App. at 308). As of the 2000 Census, Osage County was 84% non-Indian, Osage Indians accounting for 3.5% of the county's population. Glimpse Aff., ¶ 14 (2 Aplt. App. at 309); 2 Aplt. App. at 331 (2000 population demographics map for Osage County).

Land ownership also dramatically shifted from tribal members to nonmembers through certificates of competency. By 1957, 1.1 million of the 1.4 million-acre county was alienated from trust/restricted status, Baird at 83 (2 Aplt. App. at 239), and as of 1972, just 231,070 acres remained in restricted ownership. 1 Aplt. App. at 89. As of 2008, the United States holds about 0.04% of the total land in Osage County in trust for the Osage Nation. Harwell Aff., ¶¶ 3-6 (2 Aplt. App. at 291-92). Like in *Hagen*. we think "[t]his 'jurisdictional history,' as well as the current population situation in [Osage County], demonstrates a practical acknowledgment that the Reservation was diminished." *Hagen*, 510 U.S. at 421.

We conclude that the Osage reservation has been disestablished by Congress.[1] As a result, we need not reach whether tribal members who reside and earn

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[1] In reaching this conclusion, we have also carefully considered the other arguments raised by the Nation including: (1) that tribal, federal, and state sovereign authorities currently co-exist within the reservation's boundaries, Aplt. Br. at 19, 33-34; (2) that the district court improperly relied on judicial statements involving other tribes and reservations in Oklahoma, Aplt. Br. at 24; (3) that the district court improperly relied on "modern academic commentary of historians and demographers, post hoc commentary which has little probative value" and "is not subject to the legal standards applied by the Supreme Court," Aplt. Reply Br. at 11-12, Aplt. Br. at 24; (4) that the district court placed undue reliance on modern-day demographics, Aplt. Br. at 41-42; and (5) that the Defendants' 2000 census data is misleading and underrepresents the Osage, Aplt. Reply Br. at 16- 17. To the extent these arguments are not subsumed by our analysis, we are not persuaded.

income on fee lands located within the geographic boundaries of a reservation are exempt from state income tax. We also need not address the district court's application of laches to this case, although we note that the Nation concedes that Oklahoma has had a "long-standing practice of asserting jurisdiction" in Osage County. 2 Aplt. App. at 356. "[T]he longstanding assumption of jurisdiction by the State over an area that is [predominantly] non-Indian, both in population and in land use, may create justifiable expectations" that "merit heavy weight." *City of Sherrill*, 544 U.S. at 215-16 (internal quotation marks and citations omitted) (applying laches, acquiescence, and impossibility to preclude the Oneida Indian Nation's requested relief).

AFFIRMED.

The motion to withdraw as attorney filed by Kathryn L. Bass is GRANTED.

APPENDIX C
IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

OSAGE NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.01-CV-
	)	516-JHP-
STATE OF OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION; THOMAS E. KEMP, JR., Chairman of the Oklahoma Tax Commission; JERRY JOHNSON, Vice-Chairman of the Oklahoma Tax Commission; DON KILPATRICK, Secretary-Member of the Oklahoma Tax Commission,	)	FHM
	)	
Defendants.	)	

ORDER

Now before the Court is Defendants' Motion for Summary Judgment (Dkt.# 79). Defendants initially filed a motion to dismiss (Dkt.# 72), under Fed.R.Civ.P. 12(b)(1) and 12(b)(6) arguing: (1) the Court lacks subject matter jurisdiction over the Nation's claim for a judicial determination as to reservation status; and (2) the Nation has failed to adequately state a claim upon which relief may be granted. The Court converted Defendants' motion to

dismiss to a motion for summary judgment pursuant to Fed.R.Civ.P. 56 and provided the parties with additional time to present all materials made pertinent to such a motion. Plaintiff Osage Nation ("the Nation") has opposed the motions, and Defendants have filed Replies.

In its Second Amended Complaint ("Complaint"), the Nation seeks a declaratory judgment that its reservation boundaries have not been disestablished and that, as a matter of law, the Osage Reservation is Indian country within the meaning of 18 U.S.C. §1151. The Nation further seeks injunctive relief prohibiting Defendants from imposing and collecting taxes on the income of the Nation's members who both reside and earn income within reservation boundaries.

In general, summary judgment is proper where the pleadings depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue of fact is "genuine" if the evidence is significantly probative or more than merely colorable such that a jury could reasonably return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is "material" if proof thereof might affect the outcome of the lawsuit as assessed from the controlling substantive law. *Id. at 249.*

In considering a motion for summary judgment, this court must examine the factual record and

reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Gray v. Phillips Petroleum Co.*, 858 F.2d 610, 613 (10th Cir. 1988). In regard to the necessary burdens, however, the Supreme Court has instructed that:

> in cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file. Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by their own affidavits, or by the" depositions, answer to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Furthermore, if on any part of the prima facie case there is insufficient evidence to require submission of the case to the jury, summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In addition, one of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. *Celotex, 477 U.S. at 323-24.*

Article III Jurisdiction

Defendants have asserted a federal jurisdictional challenge to the claims asserted by the Nation. Specifically, Defendants challenge the standing of the Nation to bring its claim regarding the status of its reservation against Defendants, as members of the Oklahoma Tax Commission.

When a court makes an inquiry as to a party's standing, the court must accept as true all material allegations of the complaint, and any other particularized allegations of fact, in affidavits or in amendments to the complaint. *Warth v. Seldin, 422 U.S. 490, 501 (1975).* "If, after this opportunity [to present facts to support standing], the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." *Id. at 501-02.*

In its Complaint, the Nation alleges that its reservation boundaries were established by the Act of June 5, 1872, and that those reservation boundaries have never been disestablished by Congress. The Nation further alleges that the functions of its tribal government are carried out within its reservation and that, by virtue of its constitution, the Nation's jurisdiction and exercise of self-government extends to all lands within its reservation. The Nation does not seek to have this Court create or re-establish its reservation boundaries; rather, its claim against Defendants is based on allegations that its reservation continues to exist and that Defendants' present taxing activity against its tribal members located in the reservation violates federal law.

Thus, construing these material allegations as true, the Court finds the Nation has standing to challenge the actions of Defendants under well-established law prohibiting the state from imposing and collecting taxes on the income of a tribal member who both resides and earns that income within Indian Country. *See, e.g., Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995); Oklahoma Tax Commission v. Citizen Band Potawatomie Indian Tribe of Oklahoma, 498 U.S. 505 (1991); McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973).*

Likewise, it is well-established that Indian tribes have standing to sue to protect sovereign or quasi-sovereign interests. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976)(Indian tribe had standing as a tribe, apart from the claims of individual tribal members, to challenge legality of state motor vehicle tax); Prairie Band of Potawatomie Indians of Pierce, 253 F.3d 1234, 1241 (10th Cir. 2001)(Indian tribe had standing to sue State of Kansas to prevent interference with or infringement on tribe's right to self-government).* Therefore, the Court finds the Nation has adequately alleged Defendants' taxing activity within its reservation boundaries is an unlawful infringement on the Nation's sovereignty and right of self-government. Thus, Defendants' challenge to federal jurisdiction is overruled.

Introduction

In this case, the Nation mounts an unprecedented challenge, asserting that the income

of any Osage member who works and resides anywhere within Osage County is absolutely immune from state income taxation, even if that member works on privately owned fee land, not held in trust by the United States or subject to federal restraints on alienation (private fee lands), drives exclusively on state or county maintained roads to a home on private fee lands, has children attending state supported schools, and receives the great bulk of his or her social services from the State, not the Nation. Defendants' concern is expressed in the Joint Status Report:

> Because of its potentially far-reaching impact on the State of Oklahoma, this is one of the more important cases relating to state sovereignty and jurisdiction to arise since statehood in 1907. In this case, the Osage Nation seeks to divest the state of over 100 years of the exercise of sovereignty and jurisdiction over all of Osage County, the largest county in Oklahoma in area. If the Osage Nation were to prevail, precedent would be set potentially threatening the jurisdiction of the state as a whole, the counties, and local jurisdictions. If the Osage Nation's original reservation boundaries have not been disestablished, then a number of other tribes in Oklahoma could assert the same claim. The implications of this on the civil and criminal jurisdiction of the state are staggering, because this is a state that is largely made up of former Indian reservations.

(Dkt.# 66 Joint Status Report at 1-2.).

The Nation's Complaint requests two kinds of relief. First, the Complaint asks this Court to declare that all 2,296 square miles of Osage County comprise a reservation. Second, based upon the claim that the entire county should be declared a reservation, the Complaint seeks to prospectively enjoin the Commissioners, in their official capacities on behalf of the State of Oklahoma Tax Commission (Commission), from levying Oklahoma state income taxes upon the Nation's members who earn income and reside anywhere within the geographic boundaries of its alleged reservation - all of Osage County. The Complaint also seeks to support its claim by contending that a federal criminal statute, 18 U.S.C. § 1151, forecloses state taxation of all income earned within "Indian country."

Defendants contend they have not acted in excess of their authority under federal law, and have not violated federal law in imposing Oklahoma's income tax on incomes of members of the Osage Nation who neither earn income in employment nor reside on Trust, or Restricted Lands In Osage County. Further, Defendants argue that Osage County is not a reservation, and the tax is not preempted because the Nation cannot show specific federal statutes or established policies that foreclose the State's legitimate interest in securing revenues necessary to support its services to tribal members in predominantly non-Indian and non-Osage, Osage

County.[1] Specifically, Defendants allege the Osage Reservation, as created by the Act of June 5, 1872, was disestablished, dissolved, and no longer exists as provided by, and pursuant to, the intent of Congress. *See Hagen v. Utah, 510 U.S. 399, 410-411 (1994).* Defendants contend Congress' intent is reflected in:

(a) the statutory language used in the Oklahoma Enabling Act, Act of June 16, 1906, 34 Stat. 267 (the "Enabling Act"), and the Osage Allotment Act, Act of June 28, 1906, 34 Stat. 539 (the "Allotment Act"), by which Congress disestablished the Osage Reservation, providing, among other things, for taxation of the Osage and conversion of the reservation into a county, and subjecting the Osage to state law;

(b) the historical context surrounding the passage of the Enabling Act and the Allotment Act, see United States v. Mason, 412 U.S. 391, 396 n.7 (1973); Murphy v. Sirmons, 497 F. Supp. 2d. 1257, 1290 (E.D. Okla. 2007);

(c) the contemporaneous understandings surrounding the passage of the Enabling Act and the Allotment Act, which, reflect the influx of nonmember population and

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[1] Osage County population is 80% non-Indian and 95% nonmembers of the Nation, and less than one-sixth of Osage County remains in residential status. *See 2000 United States Census.*

recognition by federal officials of the former reservation status of the Osage Reservation in the years soon following those Acts, reinforce Congress' intent to disestablish the Osage Reservation; and

(d) even if the Osage Reservation was not disestablished, dissolved, and terminated pursuant to the Enabling Act and the Allotment Act, federal law does not preempt or otherwise bar the Commissioner Defendants from imposing Oklahoma's income tax on income of Osage members who neither earn income from employment on, nor reside on, Trust or Restricted Lands in Osage County, because State taxation, including income taxation, of such Osage members is expressly contemplated and permitted by federal law, including the Enabling Act and the Allotment Act. *See United States v. Mason, 412 U.S. 391, 396 n.7 (1973).*

Finally, Defendants argue the equitable defense of laches bars the Osage Nation's claims for declaratory and injunctive relief. The Osage Nation has left unchallenged the State's taxation of the income of its members for more than seventy years. The State would be prejudiced if declaratory or injunctive relief were now entered upsetting its long-standing taxation of the income of Osage members who neither reside on, nor earn income from employment on, Trust or Restricted Lands in Osage County. *See City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005).*

Background

To be clear, this action does not concern taxation of tribal members living and earning income on trust or restricted lands in Osage County. Consequently, this case does not present the issues addressed in prior litigation concerning tribal members residing and working on trust or restricted lands. *See, e.g., Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993).* Indeed, Defendants do not contest the right of Osage tribal members both earning income and residing on the limited, scattered parcels of trust or restricted lands within Osage County to be free from state income taxation. Instead, the Nation asks this Court to confirm the entirety of Osage County is a reservation, notwithstanding that Congress provided for the transfer or sale of the surface of all but a very few acres of Osage lands, thereby disestablishing any reservation more than a century ago. Premised upon its requested ruling confirming reservation status, the Nation then asserts that all tribal members who reside and work *anywhere* in Osage County are exempt from state income taxation, even if they neither reside nor work on trust or restricted lands, and irrespective of whether other factors material in prior preemption cases support state taxation.

These positions are contrary to long settled understandings and expectations concerning land status and principles governing federal preemption of state taxing jurisdiction. Since the allotment of the Osage Reservation and Oklahoma Statehood as enacted in 1906, Congress and the courts have repeatedly recognized there are no reservations in Oklahoma. As Congress recognized over seventy

years ago, [i]n Oklahoma the several Indian reservations have been divided up. . . as a result of this program, all Indian reservations as such have ceased to exist and the Indian citizen. . . is assuming his rightful position among the citizenship of the State." *S. Rep. No. 1232, 74th Cong., 1st Sess. 6 (1935) (emphasis added) cf., Murphy v. Sirmons, 497 F. Supp. 2d 1257,1290 (E.D. Okla. 2007) ("A careful review of the Acts of Congress which culminated in the grant of statehood to Oklahoma in 1906, as well as subsequent actions by Congress, leaves no doubt the historic territory of the Creek Nation was disestablished as a part of the allotment process.").*

The Nation's attempt to categorically exempt its members, who are Oklahoma citizens, recipients of Oklahoma services, and subject to Oklahoma laws, from state income taxation simply because they reside and work anywhere in Osage County disregards established law. Even within acknowledged reservations, exemptions from state tax have depended on specific factors establishing tribal and federal interests overriding a state's valid interest in raising revenue to support its services. The Nation fails to plead any such factors supporting preemption of Oklahoma's legitimate taxing interest.

Applicable policies, treaties and statutes reflect the unmistakable intent that Osage County is no longer a reservation. No federal policy exempts the Nation's members who both work and reside on non-trust, non-restricted lands within Osage County from Oklahoma state income tax -¬whether or not the

lands are a reservation. The Oklahoma Organic Act,[2] the Oklahoma Enabling Act,[3] and the Act for the Division of the Lands and Funds of the Osage Indian[4] ("Osage Allotment Act") reflect Congressional intent to subject the Nation, its members and its lands to Oklahoma law and to disestablish and terminate Osage County's reservation status. Further, neither the United States Supreme Court, nor any court, has held that the federal criminal law provisions of 18 U.S.C. § 1151 apply to immunize activities on Oklahoma private fee lands from state taxation. However, even if there remained an "Osage reservation," no federal policy erects a general barrier against income taxation of tribal members whose livelihoods and residences do not implicate trust or restricted land. The Court will not unsettle the jurisdictional understandings established by enactment over a century ago.

The Osage Reservation does not Remain Intact

The Oklahoma Organic Act, the Oklahoma Enabling Act, and the Osage Allotment Act, demonstrate the Osage reservation ceased to exist more than a century ago. A reservation consists of lands set aside under federal superintendence for the residence of tribal members. *See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 34 (1982 ed).* The 1906 Osage Allotment Act terminated the federal set-aside and federal superintendence of

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[2] Act of May 2, 1890, Ch. 182 § 1, 26 Stat. 81 (1890).

[3] Act of June 16, 1906, Ch. 3335, 34 Stat. 267 (1906).

[4] Act of June 28, 1906, Ch. 3572, 34 Stat. 539 (1906).

Osage County as the place of residence of Osage members. While that Act retained certain small tracts for tribal use and occupancy and reserved the minerals underlying Osage County for the Nation, the great majority of lands in Osage County were freed from restrictions on their alienability. Income that relates exclusively to those unrestricted private fee lands is the subject of this action. Whatever may be the status of the mineral estate and the islands of trust or restricted lands, the plain Congressional intent in 1906 was to terminate any reservation status as to surface estate lands in Osage County that were freed of restrictions on alienation.

The Supreme Court has articulated an analytical structure for determining when Congress disestablished a reservation. *Solem v. Bartlett, 465 U.S. 463, 470 (1984).* The most probative evidence of diminishment is the statutory language used to open the Indian lands. *Hagen v. Utah, 510 U.S. 399, 411 (1994).* The historical context surrounding the passage of the relevant act also informs the analysis. *Id.*

> When events surrounding the passage of[applicable statutes] particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish

> the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged.

Solem, 465 U.S. at 471.

The language of the 1906 Osage Allotment Act and the surrounding historical circumstances establish Congress' plain intent to terminate the Nation's reservation and to subject the Nation, its members, and their non-restricted lands to Oklahoma law and Oklahoma courts. The Osage Allotment Act effected the transfer of nearly all Osage tribal lands to its members. The Act declared that the tribal lands of the Nation "shall be equally divided among the members of said tribe" by allowing each member to make three selections of 160 acres of land, with the remaining unselected lands divided equally among all members by an appointed commission. Osage Allotment Act §§ 1, 2.[5] "Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable until otherwise provided . . . . Osage Allotment Act, § 2, Fourth. The

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[5] The Division Act limited such allotments and related rights to those on the official U.S. Government roll as of January 1, 1906, and certain of their children. Members so enrolled were known as headright owners. *See* Osage Allotment Act, §§ 1-4; *Quarles v. Dennison, 45 F.2d 585, 586 (10th Cir. 1930) (defining headright).* The roll so established constituted "the legal membership" in the Nation. Osage Allotment Act, § 1.

remaining selections would be "surplus land and shall be inalienable for twenty-five years," *Id.*, provided that any adult member could petition the Secretary of the Interior ("Secretary") to issue a "certificate of competency, authorizing [such member] to sell and convey any of the lands deeded him by reason of this act, except his homestead . . . . *Id.*, § 2; Seventh. Upon the issuance of the certificate of competency, "the lands of such member (except his or her homestead) shall become subject to taxation, and such member . . . . shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States." *Id.*

Other provisions of the Act reinforce the intent to terminate the reservation. "The Osage Boarding School reserve, . . . the reservoir reserve . . . , and the agent's residence reserve, together with all the buildings located on said reservations in the town site of Pawhuska" were reserved from selection but could be sold "under such rules and regulations as the Secretary of the Interior may provide." *Id.*, § 2, Tenth. The "United States Indian agent's office building, the Osage council building, and all other buildings which are for the occupancy and use of Government employees, in the town of Pawhuska, together with the lots on which said buildings are situated, shall be sold to the highest bidder . . . " with the proceeds to be "placed to the credit of the

individual members of Osage tribe of Indians . . . ." *Id.*, § 2, Eleventh.[6]

Although the Osage Nation retained the beneficial interest in the minerals underlying the former Osage reservation area, that interest is contrasted starkly with the pattern divesting the surface, either directly or through authorizations for future sales, of all vestiges of tribal ownership. *See* Osage Division Act, §§ 2-4.[7] While the minerals underlying the former tribal lands were reserved to the Nation, all royalties received from such minerals were to be "placed in the Treasury of the United States to the credit of the members of the Osage tribe . . . and . . . . distributed to the individual members . . . .[8] Osage Allotment Act, § 4, Second. Consequently,

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[6] The Supreme Court has described the Government's plan for Osage members under the 1906 Division Act. *See Choteau v. Burnet, 283 U.S. 691, 694 (1931) ("This plan has included imposing upon him both the responsibilities and the privileges of the owner of property, including the duty to pay taxes."); see also Shaw v. Gibson-Zahniser Oil Corp., 276 U.S. 575, 579 (1928) (same, regarding Creek tribal members).*

[7] Of the total original Osage lands comprising over 1.47 million acres, all were allotted except 645.34 acres retained by the tribe and 4,575.49 acres reserved for town sites, schools, cemeteries and federal agency purposes(with those lands generally subject to sale). *See* Report of Subcommittee on Indian Affairs, Osage Nation of Indian Judgment Funds at 18 *accompanying* S. 1456 and S. 3234 (March 28, 1972). As of 1972, of the 1,464,838.5 acres that were originally allotted, only 231,070.59 acres remained in restricted status. *Id.*

[8] The retention of a subsurface mineral interest for the benefit of the Nation's members does not render the entirety of Osage County a reservation. The term reservation refers to land set aside under federal protection for the residence of tribal

the Nation stood as recipient of those funds solely for the benefit of the allottee members.

Although the Act contemplated a continuing tribal government, it left few powers to exercise. All moneys received from the sale of terminated reservation land, as with the royalties from minerals, were held as property of individual members. Osage Allotment Act, § 4, First. Public highways could be established within the "Osage Indian Reservation" lands without any compensation therefore." Osage Allotment Act, § 10. Although the Act mentions the "Osage Indian Reservation," as do some subsequent enactments, it plainly does so only to describe a known geographic area. Given that the Enabling Act, earlier in the same month, had subjected the Osage lands to Oklahoma law and courts, the Division Act left little role for a general tribal government over a "reservation" area. Despite the Complaint's assertion that it arises under the Act of June 28, 1906, the Osage Allotment Act, the Act does not support this contention. The termination of Osage reservation

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Indians. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 34 (1982 ed.). The mineral retention did not preserve the surface estate for the residence of Osage members and cannot continue or establish a reservation. *See Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1267 (10th Cir. 2001) (land reserved by the government to preserve the tract s status as a tribal burial ground did not make that land a reservation, as it was not reserved for or used for purposes of residence). Similarly, *Murphy v. Sirmons*, 497 F. Supp. 2d 1257, 1290 (E.D. Okla. 2007), expressly rejected the contention that an "unobservable," partial mineral interest could support "Indian country" status for the surface of those lands.

status was part of a broader pattern of reservation termination accompanying Oklahoma s entry into the Union.

During the late 1890s and early 1900s, Congress systematically negotiated or legislated transfers of tribal lands to tribal members and the opening of unallotted lands to settlement and entry by non-Indians. *See generally, II FRANCIS PAUL PRUCHA, THE GREAT FATHER, 735-757 (1984) ("Prucha").* Thirteen Indian reservations were in Oklahoma Territory as established by an act of Congress on May 2, 1890. The last of these reservations to be dissolved by allotments was that owned and occupied by the Osage, embracing about 1,470,059 acres, now comprising Osage County; *see also B. B. Chapman, Dissolution of the Osage Reservation, 20 Chronicles of Oklahoma 244 (1942).* Francis Paul Prucha, "widely considered the leading historian of federal Indian policy," has concluded that, as a result of this history: "There are no Indian reservations in Oklahoma . . . and the reservation experience that was fundamental for most Indian groups in the Twentieth Century was not part of Oklahoma Indian history." PRUCHA at 757. Recently, the U. S. District Court for the Eastern District of Oklahoma reached the same conclusion in *Murphy v. Sirmons, 497 F. Supp. 2d 1257, 1290 (E.D. Okla. 2007).*

The language of the Oklahoma Enabling Act and its incorporation of the Oklahoma Organic Act support the conclusion that there are no Indian reservations in Oklahoma. The Act of March 3, 1885, Ch. 341, 23 Stat. 362 (1885), which applied to territories generally, was made applicable by passage

of the Oklahoma Organic Act to the Oklahoma Territory upon its formation in 1890. Section 9 of the 1885 Act provided that any Indian committing a crime within any of the Territories of the United States shall be subject to the laws of the Territory and be subject to the same punishment as a non-Indian. 23 Stat. 362, 385. The Oklahoma Organic Act, Ch. 182, 26 Stat. 81 (1890), § 11 generally made laws of the state of Nebraska applicable throughout the Oklahoma Territory. Under the Organic Act, the Territorial courts had jurisdiction over crimes involving Indians, whether or not the crime occurred on Indian lands. The Territorial courts were given jurisdiction over all cases involving Indians, except controversies between members of the same tribe, while maintaining their tribal relations. Organic Act, § 12.

This broad jurisdiction over tribes and their members under the Organic Act was carried forward under § 20 of the Enabling Act. The Oklahoma Enabling Act, Ch. 3335, 4 Stat. 267, §13, provided that the laws in force in the Territory of Oklahoma, as far as applicable, shall extend over and apply to said State until changed by the legislature thereof. Consequently, Territorial law subjecting all residents, regardless of race or ethnicity, to the same courts and making them subject to the same penalties was extended over all Oklahoma Indians, including the Nation, upon Statehood.[9] Accordingly,

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[9] The Complaint cites a disclaimer provision of § I of the Enabling Act. However, such provisions pertain to retained tribal lands, not the unrestricted lands involved here. *See, e.g.*,

the Oklahoma Enabling Act also does not support the Nation's claim for relief.

These provisions have led to the understanding that Oklahoma reservations were disestablished. As stated in *Murphy v. Sirmons* with respect to the *Muscogee (Creek) Nation*, "State laws have been applied over the lands within the boundaries of the Creek nation for over a hundred years. *Murphy v. Sirmons*, 497 F. Supp. 2d at 1290. "The Organic and Enabling Acts confirm that . . . Indian reservations do not exist in Oklahoma." *Id.* at 1289-1290.

Contemporaneous consensus at the time also reflected the understanding that the Acts divested Oklahoma tribes of both title and jurisdiction through land transfers authorized by contemporaneous legislation, and that Oklahoma law would apply to all civil matters occurring on former Indian lands. *Cf., Montana v. United States,* 450 U.S. 544, 559 n. 9 (1981) (allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction.).[10] Section 21 of the Enabling Act specified that the former Osage reservation should constitute a separate county, and that Oklahoma's constitutional convention shall designate the county seat and provide rules and regulations

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Indian Country USA, Inc. v. Okla, 829 F.2d. 967, 976-81 (10th Cir. 1987).

[10] The Supreme Court observed in *United States v. Oklahoma Gas & Elec. Co.*, 127 F.2d 349, 353 (10th Cir. 1942), *aff'd*, 318 U.S. 206 (1943), that it is common knowledge that lands allotted in severalty in Oklahoma are essentially a part of the [non-Indian] community in which they are situated . . . ."

and define the manner of conducting the first election for officers in said county. The Supreme Court recognized that Osage history distinguished the Nation from tribes like the Navajo Nation in *United States v. Mason, 412 U.S. 391 (1973)*. Mason held the United States had no duty to resist payment of Oklahoma inheritance tax on unrestricted interests in an Osage deceased member's estate. The *Mason* Court distinguished *McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 174 (1973)*, because *McClanahan* had contrasted the trust land of the Navajo Reservation with the status of the Osage as described in *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943), observing "that 'the [Indian sovereignty] doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community.'" *Mason, 412 U.S. at 396n.7.*

Subsequent Congressional enactments further confirm Congress' intent and contemporaneous understanding that there were no remaining reservations in Oklahoma. The legislative history of the Oklahoma Indian Welfare Act, Ch. 831, 49 Stat. 1967 (1936), a statute central to defining an Oklahoma tribes' status, provides: [i]n Oklahoma the several Indian reservations have been divided up . . . as a result of this program, ***all Indian reservations as such have ceased to exist*** and the Indian citizen . . . is assuming his rightful position among the citizenship of the State. S. Rep. No. 1232, 74th Cong., 1st Sess. 6 (1935) (emphasis added). In a Senate report accompanying a 1974 amendment to the Federal Property and Administrative Services Act, the Report explained: The Committee amendment to

H.R. 8958 adds a provision that will extend the same disposal authority for excess land in Oklahoma that is provided by the bill for the rest of the United States. ***This provision is necessitated by the fact that there are no reservations in Oklahoma***." *S. Rep. No. 93 -1324, 93rd Cong., 2nd Sess. 2 (Dec. 11, 1974) (emphasis added).* Under *Solem v. Bartlett*, those understandings are entitled to great weight. *See Shawnee Tribe v. United States, 423 F.3d 1204, 1227 (10th Cir. 2005) ("we may not ignore the plain language of the instrument that 'viewed in historical context and given a 'fair appraisal,' clearly runs counter to a tribe's later claims.'")(citation omitted); Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010, 1020 (8th Cir. 1999) ("It is well established that similar treaty language does not necessarily have the same effect when dealing with separate agreements, context has been found to play a similarly important role in interpreting the language of the surplus land acts.").*

Income of Tribal Members Working and Living on Private Fee Lands in Osage County is not Exempt from Taxation — Federal Common Law

The Complaint arises under several bases in federal law, including federal treaties, statutes and federal common law. However, none of these sources support the claim that tribal members working and living anywhere within Osage County are immune from Oklahoma income tax. Consequently, the focus is on the Nation's assertion that federal common law governing tribal immunity from state taxation preempts Oklahoma's taxation authority.

The Nation seeks to immunize all tribal members in Osage County from income tax if they both live and earn income in Osage County irrespective of the actual status of the land on which the members reside, and the actual source of that income. Federal common law with respect to the preemption of state income taxation of reservation Indians does not support such a broad claim.[11] *See McClanahan v. Ariz. State Tax Comm n, 411 U.S. 164 (1973).* In *McClanahan*, the United States Supreme Court analyzed treaties and statutes applicable to the trust land of the Navajo Nation before concluding Arizona's taxation was preempted. *McClanahan's* holding, however, was premised on the fact the Court was dealing with a reservation. Therefore, *McClanahan*, merely established that a tribal member who resided on a recognized reservation, and whose income was derived wholly from reservation sources, was exempt from state income taxation. *Id. at 179. McClanahan* never established either an exemption applying categorically to all tribal members residing in Indian country, or an exemption which applied, regardless of the source of the tribal member's income.

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[11] *See Dep't of Tax. & Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 69 (1994) (challenge to tribal taxation) ("Respondents' challenge to New York s regulatory scheme is essentially a facial one. In reviewing a challenge of this kind, we do not rest our decision on consequences that, while possible, are by no means predictable. ...[W]e confine ourselves to those alleged defects that inhere in the regulations as written.") The facial challenge the Nation presents here is whether all members living and earning income on fee lands within Osage County are absolutely immune from tax.

Further, although the Supreme Court has referenced Indian country status as supportive of tribal immunity from state taxation, *see Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993)*, its cases do not support the notion that all lands described by the subparagraphs of 18 U.S.C. § 1151 are automatically immunized from state taxation. To the contrary, while "Indian country" status under 18 U.S.C. § 1151 has been deemed pertinent in some instances, the Court has in each case considered other factors in determining state taxing powers.

Application of the Indian country analysis to address taxation has required lands to satisfy two requirements: "first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence. *Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998)(addressing dependent Indian community subcategory of Indian country.")*. The Court's most recent reference to the pertinence of the federal criminal code in civil matters, *Atkinson Trading Co. v. Shirley, 532 U.S. 654 (2001)*, reversed the Tenth Circuit's determination that the Navajo Nation could tax Atkinson's fee lands operation within the boundaries of the Navajo Nation under the language of 18 U.S.C. § 1151(a) defining Indian country as lands within the limits of an Indian reservation, notwithstanding the issuance of any patent . . ." The Court made plain that "Indian country" status is not dispositive if there is no "claim of statutorily conferred power. Section 1151 simply does not address an Indian tribe's inherent or retained sovereignty over non-members on non-Indian fee land." 532 U.S. at 653 n.5. Under

the same analysis, given that there is no claim Congress expressly immunized tribal members' incomes in "Indian country" from state taxation, Section 1151 simply does not address an Osage tribal member's claimed immunity from state income taxation.

Also, probative of the issue is the tribes' diminished power over fee lands and enhanced state powers over such lands. Income derived from fee land sources is akin to income derived outside the tribe's jurisdiction, which is subject to taxation. Indeed, in *Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980)*, the Supreme Court contrasted the taxability of cigarettes marketed by the smoke shops to persons outside Indian country, and which value was not generated on the reservation, with the claim of the tribal member in *McClanahan* who derived all her income from reservation sources. The *Colville* Court rejected the notion that a tribe could exploit "principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, [to] authorize Indian tribes to market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.* Instead, the Court found, "[t]he State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Id. at 157.*

Under a preemption analysis, income of a tribal member resident on fee lands earned from sources in which the Nation does not have a significant interest,

i.e., from employment with the State or a non-member enterprise or entity, even in Osage County (assuming it were a reservation), would be subject to state income tax. The Nation fails to address whether tribal interests, or federal interests that could give rise to preemption under federal law, are implicated when tribal members earn income on fee lands and drive across state highways to a home on fee lands. The Complaint fails to articulate a single federal interest that conflicts with Oklahoma income taxation of such members.

As applied to the unique and uncommon history of Oklahoma tribes, and the Osage Nation in particular, these principles do not oust or preempt Oklahoma's income taxation challenged here. *See Oklahoma Tax Comm n v. United States, 319 U.S. 598 (1943).* In holding that portions of the estates of deceased members of the Five Civilized Tribes are subject to Oklahoma estate taxation, the Oklahoma Tax Commission Court recognized that principles applicable to Indians elsewhere in the United States do not apply directly to Oklahoma Indians: "Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy . . . [T]hey are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and [express] tax exemptions." *319 U.S. at 603.* The Court distinguished the sovereignty principles laid down in *Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1831),* where "the Indian tribes were separate political entities with all the rights of independent status – a condition which has not existed for many years in the State of Oklahoma." *319 U.S. at 602.* Recognizing

that Oklahoma supplies "schools, roads, courts, police protection, and all the benefits of an ordered society . . . " to the tribal members involved in the case, and that an income tax, based solely on ability to pay . . . ,"[12] is not an unreasonable burden, *Id. at 609*, the Court upheld Oklahoma's taxes on the restricted cash and securities in the tribal members' estates, but disallowed only the tax on statutorily restricted allotment lands, which the statute expressly rendered expressly "restricted and tax exempt." *Id. at 611.*

With respect to Osage lands in Osage County, the Supreme Court long ago recognized the Congressional intent that such lands be subject to state taxation. *See McCurdy v. United States, 246 U.S. 263, 269-70 (1918) (once restrictions on Osage lands were removed pursuant to the Act of June 28, 1906, former Osage restricted lands became subject to state taxation).* In *Choteau v. Burnet, 283 U.S. 691, 695-96 (1931)*, the Court reasoned similarly that an Osage allottee's income from oil and gas royalties after the removal of restrictions under the 1906 Osage Act is subject to federal income tax. "His shares of the royalties from oil and gas leases was payable to him, without restriction upon his use of the funds so paid. It is evident that as respects his property other than his homestead his status is not different from that any citizen of the United States."

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[12] The Court also noted the substantial wealth of members of the Osage Tribe. *Id.* at 609 n.13.

Id. [13] With respect to the Osage, Oklahoma's Congressional delegation has expressly acknowledged that funds and securities, income, and estates of these Osage Indians are subject to taxation, the same as for other citizens. *Hearing before the Subcommittee on Indian Affairs on H. Con. Res. 108 (July 22, 1953), Statement of Oklahoma Members in Congress.* Osage unrestricted fee lands, and income related to them, are presumptively subject to state taxes.

The Major Crimes Act

The Supreme Court requires a tribe alleging claims under federal common law to "articulate what prescription of federal common law enables a tribe to maintain an action for declaratory and injunctive relief establishing its sovereign right to be free from state [law]." *See Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty., 538 U.S. 701, 712 (2003).* Just as in *Inyo County*, it is unclear what federal law, if any, the Tribe's case "aris[es] under." *Id (quoting 28 U.S.C. § 1331) (brackets in original).* The Nation's citation to a federal criminal statute and cases pertaining to trust or restricted lands affords no specific support.

Given the requirement of a prescription of federal law, *see Id.*, 18 U.S.C. § 1151 is not a federal law that

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[13] The Court relied on § 2, Seventh, of the Osage Allotment Act, Ch. 3572, 34 Stat. 539 (1906): "upon the issuance of such certificate of competency, the lands of such member (except his or her homestead) shall become subject to taxation, and such member shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States."

the Nation's case arises under. In addition to defining federal criminal powers, that statute "confer[s] upon Indian tribes jurisdiction over certain criminal acts occurring in 'Indian country.'" *Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653 n.5 (2001).* The statute's legislative history confirms that it was intended to codify prior case law governing jurisdiction to prosecute crimes in Indian country. *See Report of Judiciary Committee accompanying H. R. 3190, 80th Cong., 1st Sess. (April 24, 1947) at A-91, A-92.* It does not establish civil immunities from state taxation.

The Supreme Court's references to 18 U.S.C. § 1151 in prior cases do not support a different result. *Okla. Tax Comm n v. Sac & Fox Nation, 508 U.S. 114 (1993),* does not address taxation on fee lands within an alleged reservation. Rather, it reversed a decision in which the lower courts construed *McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973),* as immunizing tribal members income from State taxation whenever the income was derived from tribal employment on tribal trust lands, and specifically required that the member also live on trust land: "*The residence of a tribal member is a significant component* of the McClanahan presumption against state tax jurisdiction." *Sac & Fox, 508 U.S. at 123 (emphasis added).* Although *Sac & Fox* contains some broad language, it narrowed the scope of available immunity to tribal members living and working on land set aside for those members. *Id. at 124.* The *Sac & Fox* Court s discussion of *Oklahoma Tax Comm n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 511 (1991),* while employing broad language regarding Indian country, again emphasized that the case concerned a tribal

convenience store located outside the reservation on land held in trust for the Potawatomi. *508 U.S. at 125 (emphasis added).* Thus, while the Court in *Sac & Fox* and *Citizens Band* referred to Section 1151, neither case addressed tax immunity with respect to tribal members both working and residing on fee lands. Indeed, subsequent to both those decisions, the Supreme Court ruled that Oklahoma may tax the income of tribal members who earn income working for the tribe on tribal lands, but who live outside Indian country. *See Oklahoma Tax Comm n v. Chickasaw Nation, 515 U.S. 450, 464 (1995).* Given that holding, the Nation cannot establish that state income taxation is foreclosed when the taxpayer neither works nor lives on restricted lands.

While the Supreme Court has occasionally said Section 1151 *generally* applies to questions of civil jurisdiction, the cases have carefully couched such language in nonmandatory terms. *DeCouteau v. District County Court, 420 U.S. 425, 427 n. 2 (1975) (emphasis added); see also Alaska v. Native Village of Venetie, 522 U.S. 520, 527 n.1 (1998) ("Generally speaking. . .").* Rejecting any contention that "Indian country" status prescribes mandatory civil tax consequences, the Supreme Court in *Atkinson Trading Co. v. Shirley, 520 U.S. at 654*, expressly rejected applying Section 1151 to require a nonmember to pay Navajo Nation taxes on fee lands within an undisputed, treaty-based reservation.[14] In

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[14] Cases such as the Tenth Circuit s decision in *Pittsburgh & Midway Coal Mining Company v. Watchman*, 52 F.3d 1531, 1540 (10th Cir. 1995), which rejected the argument that Section

fact, given the disestablishment of the Osage and other Oklahoma reservations long before the Indian country statute was codified, using the 1948 statute to exempt Osage members from state income tax is particularly anomalous. *See, e.g., Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010, 1022 (8th Cir. 1999) ("Members of Congress in 1894 operated on a set of assumptions which are in tension with the modern definition of Indian country, and the intentions of that Congress . . . are what we must look to here.").* Considering the context of sovereignty pertinent to state taxation of tribal members, and Congress' understanding in 1906 that Osage members were citizens of Oklahoma for taxation and other purposes, 18 U.S.C. § 1151 creates no rights that may be asserted by such members – or by the Nation in this action.

Longstanding Reliance by the State of Oklahoma Is a Significant Factor Counseling Against a Decision Altering Jurisdictional Assumptions.

The ability to raise revenues to support its services to Osage County lands and the tax status of Osage tribal members is of critical importance to Oklahoma. If this Court were to now establish Osage County as a reservation more than a century after

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1151 applies only to criminal jurisdiction, could not take into account the Supreme Court's subsequent guidance in *Atkinson*. They do not address whether federal policies preempt a state's ability to tax income in circumstances that do not implicate substantial federal interests.

Congress was understood to have dissolved that status *and* that such status automatically deprives Oklahoma of the ability to fund services in Osage County through income taxes, the State's provision of services would be severely threatened. Such a ruling would also affect the State's Sovereign rights, the State's jurisdiction over its citizens, and critical revenue, across a broad piece of land in which Congress has previously recognized the State has a right to exert its dominion. See Enabling Act, Ch. 3335, 34 Stat. 267 (1906), § 11.

Such a result would contravene substantial reliance interests, as did a similar claim affecting riverbed rights in Idaho: "[The Tribe's claim] is especially troubling when coupled with the far-reaching and invasive relief the Tribe seeks, relief with consequences going well beyond the typical stakes in a real property quiet title action. The suit seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State. The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands." *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 282 (1997). Similarly, standards of federal Indian law and federal equity practice preclude the Nation from advancing its claims here. *City of*

Sherrill v. Oneida Indian Nation, 544 U.S. 197, 214 (2005). In *City of Sherrill*, the Court ruled that equitable considerations of laches, acquiescence and impossibility barred the Oneida Tribe's claim that it could exercise sovereign control over lands within the boundaries of the tribe's former reservation and avoid payment of city property taxes.

Oklahoma has governed Osage County as a county for over 100 years. The County is predominately non-Indian and non-Osage. [15] The Osage have not sought to reestablish their claimed reservation or to challenge the State s taxation until recently. Recognizing Osage County as a reservation and ousting Oklahoma income taxation over Osage members would have significant practical consequences not only for income taxation, but potentially for civil, criminal and regulatory jurisdiction in Osage County.

Accordingly, Defendants' Motion for Summary Judgment is granted.

/s/ James H. Payne
James H. Payne
United States District Judge
Northern District of Oklahoma

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[15] According to the 2000 United States Census, Osage County had a population of 44,437, of whom 9,209 (or 20.7%) identified themselves as being American Indians, in whole or in part. The number of inhabitants of Osage County who identified themselves as Osage Indians, in whole or in part, was 2,403 (or 5.4% of the population of Osage County).

APPENDIX D

CHAP. 3572.—An Act For the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the roll of the Osage tribe of Indians, as shown by the records of the United States in the office of the United States Indian agent at the Osage Agency, Oklahoma Territory, as it existed on the first day of January, nineteen hundred and six, and all children born between January first, nineteen hundred and six, and July first, nineteen hundred and seven, to persons whose names are on said roll on January first, nineteen hundred and six, and all children whose names are not now on said roll, but who were born to members of the tribe whose names were on the said roll on January first, nineteen hundred and six, including the children of members of the tribe who have, or have had, white husbands, is hereby declared to be the roll of said tribe and to constitute the legal membership thereof: *Provided,* That the principal chief of the Osages shall, within three months from and after the approval of this Act, file with the Secretary of the Interior a list of the names which the tribe claims were placed upon the roll by fraud, but no name shall be included in said list of any person or his descendants that was placed on said roll prior to the thirty-first day of December, eighteen hundred and eighty-one, the date of the adoption of the Osage constitution, and the Secretary of the Interior, as early as practicable,

shall carefully investigate such cases and stall determine which of said persons, if any, are entitled to enrollment: but the tribe must affirmatively show what names have been placed upon said roll by fraud; but where the rights of persons to enrollment to the Osage roll have been investigated by the Interior Department and it has been determined by the Secretary of the Interior that such persons were entitled to enrollment, their names shall not be stricken from the roll for fraud except upon newly discovered evidence; and the Secretary of the Interior shall have authority to place on the Osage roll the names of all persons found by him, after investigation, to be so entitled, whose applications were pending on the date of the approval of this Act; and the said Secretary of the Interior is hereby authorized to strike from the said roll the names of persons or their descendants which he finds were placed thereon by or through fraud, and the said roll as above provided, after the revision and approval of the Secretary of the Interior, as herein provided, shall constitute the approved roll of said tribe; and the action of the Secretary of the Interior in the revision of the roll as herein provided shall be final, and the provisions of the Act of Congress of August fifteenth, eighteen hundred and ninety-four, Twenty-eighth Statutes at Large, page three hundred and five, granting persons of Indian blood who have been denied allotments the right to appeal for the courts, are hereby repealed as far as the same relate to the Osage Indians; and the tribal lands and tribal funds of said tribe shall be equally divided among the members of said tribe as hereinafter provided.

SEC. 2. That all lands belonging to the Osage tribe of Indians in Oklahoma Territory, except as herein provided, shall be divided among the members of said tribe, giving to each his or her fair share thereof in acres, as follows:

First. Each member of said tribe, as shown by the roll of membership made up as herein provided, shall be permitted to select one hundred and sixty acres of land as a first selection; and the adult members shall select their first selections and file notice of the same with the United States Indian agent for the Osages within three months after the approval of this Act: *Provided*, That all selections of lands heretofore made by any member of said tribe, against which no contest is pending, be, and the same are hereby, ratified and confirmed as one of the selections of such member. And if any adult member fails, refuses, or is unable to make such selection within said time, then it shall be the duty of the United States Indian agent for the Osages to make such selection for such member or members, subject to the approval of the Secretary of the Interior. That all said first selections for minors shall be made by the United States Indian agent for the Osages, subject to the approval of the Secretary of the Interior: *Provided*, That said first elections for minors having parents may be made by said parents, and the word "minor" or "minors" used in this Act shall be held to mean those who are under twenty-one years-of age: And provided further, That all children born to members of said tribe between January first, nineteen hundred and six, and the first day of January, nineteen hundred and seven, shall have their selections made for them within six months after approval of this Act, or within six

months after their respective births. That all children born to members of said tribe on and after the first day of January, nineteen hundred and seven, and before the first day of July, nineteen hundred and seven, shall hare their selections made for them on or before the last day of July, nineteen hundred and seven, the proof of birth of such children to be made to the United States Indian agent for the Osages.

Second, That in making his or her first selection of land, as herein provided for, a member shall not be permitted to select land already selected by or, in possession of, another member of said tribe as a list selection, unless such other member is in possession of more land than he and his family are entitled to for list selections under this Act; and in such cases the member in possession and having houses, orchards, barns, or plowed land thereon shall have the prior right to make the first selection: *Provided*, That where members of the tribe are in possession of more land than they are entitled to for first selections herein, said members shall have sixty days after the approval of this Act to dispose of the improvements on said lands to other members of the tribe.

Third, After each member thus selected his or her first selection as herein provided, he or she shall be permitted to make a second selection of one hundred and sixty acres of land in the manner herein provided for the first selection.

Fourth. After each member has selected his or her second selection of one hundred and sixty acres of land as herein provided, he or she shall he permitted to make a third selection of one hundred and sixty

acres of land in the manner herein provided for the first and second selections: *Provided*, That all selections herein provided for shall conform to the existing public surveys in tracts of not less than forty acres, or a legal subdivision of a less amount, designated a "lot." Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable until otherwise provided by Act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and shall be inalienable for twenty-five years, except as hereinafter provided.

Fifth. After each member has selected his or her first, second, and third selections of one hundred and sixty acres of land, as herein provided, the remaining lands of said tribe in Oklahoma Territory, except as herein provided, shall be divided as equally as practicable among said members by a commission to be appointed to supervise the selection and division of said Osage lands.

Sixth. The selection and division of lands herein provided for shall be made under the supervision of, or by, a commission consisting of one member of the Osage tribe, to be selected by the Osage council, and two persons to be selected by the Commissioner of Indian Affairs subject to the approval of the Secretary of the Interior; and said commission shall settle all controversies between members of the tribe relative to said selections of land; and the schedules

of said selections and division of lands herein provided for shall be subject to the approval of the Secretary of the Interior. The surveys, salaries of said commission, and all other proper expenses necessary in making the selections and division of land as herein provided shall be paid by the Secretary of the Interior, out of any Osage funds derived from the sale of town lots, royalties from oil, gas, or other minerals, or rents from grazing land.

Seventh. That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this Act, except his homestead, which shall remain inalienable and nontaxable for a period of twenty-five years, or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs: *Provided*, That upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States: *Provided*, That, the surplus lands shall be nontaxable for the period of three years from the approval of this Act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress; *And provided further*, That nothing herein shall authorize the sale of the oil, gas, coal, or

other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided: *And provided further*, That the oil, gas, coal, and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress.

Eighth. There, shall be reserved from selection and division, as herein provided, one hundred and sixty acres on which the Saint Louis School, near Pawhuska, is located, and the one hundred and sixty acres on which the Saint John's School, on Hominy Creek, Osage Indian Reservation, is located, said tracts to conform to the public surveys; and said tracts of land are hereby set aside and donated to the order of the Sisters of Saint Francis; and said tracts shall be conveyed to said order, the Sisters of Saint Francis, as early as practicable, by deed. There shall also be reserved from selection and division forty acres of land near Gray Horse, to be designated by the Secretary of the Interior, on which are located the dwelling houses of John N. Florer, Walter O. Florer, and John L. Bird; and said John N. Florer shall be allowed to purchase said forty acres at the appraised value placed thereon by the Osage Allotting Commission, the proceeds of the sale to be placed to the credit of the Indians and to be distributed like other funds herein provided for.

Ninth. There shall be reserved from selection and division, as herein provided, the northeast quarter of section three, township twenty-five, range nine east,

of the Indian meridian, and one hundred and sixty acres to conform to the public survey at the town of Gray Horse, including the Government doctor's building, other valuable buildings, and the cemetery, and the one hundred and sixty acres to conform to the public survey, adjoining or near the town site of Hominy; said lands or tracts are hereby set aside, for the use and benefit of the Osage Indians, exclusively, for dwelling purposes, for a period of twenty-five years from and after the first day of January, nineteen hundred and seven: *Provided*, That said land may, in the discretion of the Osage tribe, be sold under such rules and regulations as the Secretary of the Interior may prescribe; and the proceeds of the same under such sale shall be apportioned and placed to the credit of the individual members of the tribe according to the roll herein provided for.

Tenth. The Osage Boarding School reserve of eighty-seven and five-tenth acres, and the reservoir reserve of seventeen and three-tenths acres, and the agent's residence reserve, together with all the buildings located on said reservations in the town site of Pawhuska, as shown by the, official plat of the same, are hereby reserved from selection and division as herein provided; and the same may be sold in the, discretion of the Osage tribe, under such rules and regulations as the Secretary of the Interior may provide; and the proceeds of such sale shall be apportioned and placed to the credit of the individual members of said tribe according to the roll herein provided for.

Eleventh. That the United States Indian agent's office building, the Osage council building, and all

other buildings which are for the occupancy and use of Government employees, in the town of Pawhuska, together with the lots on which the said buildings are situated, shall be sold to the highest bidder as early as practicable, under such rules and regulations as the Secretary of the Interior may prescribe; and with the proceeds he shall erect other suitable buildings for the uses mentioned, on such sites as he may select, the remaining proceeds, if any, to be placed to the credit of the individual members of the Osage tribe of Indians: *Provided*, That the house known as the chief's house, together with the lot or lots on which said house is located, and the house known as the United States interpreter's house, in Pawhuska, Oklahoma Territory, together with the lot or lots on which said houses are located, shall be reserved from sale to the highest bidder and shall be sold to the principal chief of the Osages and the United States interpreter for the Osages, respectively, at the appraised value of the same, said appraisement to be made by the Osage town-site commission, subject to the approval of the Secretary of the Interior.

Twelfth. That the cemetery reserve of twenty acres in the town site of Pawhuska, as shown by the official plat thereof, is hereby set aside and donated to the town of Pawhuska for the purposes of sepulture, on condition that if said cemetery reserve of twenty acres, or any part thereof, is used for purposes other than that of sepulture, the whole of said cemetery reserve of twenty acres shall revert to the use and benefit of the individual members of the Osage tribe, according to the roll herein provided, or to their heirs; and said tract shall be conveyed to the said town of Pawhuska, by deed, and said deed shall

recite and set out in full the conditions under which the above donation and conveyance are made.

That the provisions of an Act entitled "An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and six, and for other purposes," approved March third, nineteen hundred and five, relating to the Osage Reservation, pages one thousand and sixty-one and one thousand and sixty-two, volume thirty-three, United States Statutes at Large, be, and the same are hereby, continued in full force and effect.

SEC. 3. That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred and six; and leases for all oil, gas, and other minerals, covered by selections and division of laud herein provided for, may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe: *Provided*, That the royalties to be paid to the Osage tribe under any mineral lease so made shall be determined by the President of the United States: *And provided further*, That no mining of or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided for without the written consent of the Secretary of the Interior: *Provided, however*, That

nothing herein contained shall be construed as affecting any valid existing lease or contract.

SEC. 4. That all funds, belonging to the Osage tribe, and all moneys due, and all moneys that, may become due, or may hereafter be found to be due the said Osage tribe of Indians, shall be held in trust by the United States for the period of twenty-five years from and after the first day of January, nineteen hundred and seven, except as herein provided:

First. That all the funds of the Osage tribe of Indians, and all the moneys now due or that may hereafter be found to be due to the said Osage tribe of Indians, and all moneys that may be received from the sale of their lands in Kansas under existing laws, and all moneys found to be due to said Osage tribe of Indians on claims against the United States, after all proper expenses are paid, shall be segregated as soon after January first, nineteen hundred and seven, as is practicable and placed to the credit of the individual members of the said Osage tribe on a basis of a pro rata division among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or to their heirs as hereinafter provided, said credit to draw interest as now authorized by law; and the interest that may accrue thereon shall be paid quarterly to the members entitled thereto, except in the case of minors, in which case the interest shall be paid quarterly to the parents until said minor arrives at the age of twenty-one years: *Provided*, That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misued or squandered he may withhold the payment of such interest: *And*

provided further, That said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided.

Second. That the royalty received from oil, gas. coal, and other mineral leases upon the lands for which selection and division are herein provided, and all moneys received from the sale of town lots, together with the buildings thereon, and all moneys received from the sale of the three reservations of one hundred and sixty acres each heretofore reserved for dwelling purposes, and all moneys received from grazing lands, shall be placed in the Treasury of the United States to the credit of the members of the Osage tribe of Indians as other moneys of said tribe are to be deposited under the provisions of this Act, and the same shall be distributed to the individual members of said Osage tribe according to the roll provided for herein, in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States, except as herein provided.

Third. There shall be set aside from the royalties received from oil and gas not to exceed fifty thousand dollars per annum for ten years from the first day of January, nineteen hundred and seven, for the support of the Osage Boarding School and for other schools on the Osage Indian Reservation conducted or to be established and conducted for the education of Osage children.

Fourth. There shall be set aside and reserved from the royalties received from oil, gas, coal, or other mineral leases, and moneys received from the sale of

town lots, and rents from grazing lands not to exceed thirty thousand dollars per annum for agency purposes and an emergency fund for the Osage tribe, which shall be paid out from time to time, upon the requisition of the Osage tribal council, with the approval of the Secretary of the Interior.

SEC. 5. That at the expiration of the period of twenty-five years from and after the first day of January, nineteen hundred and seven, the lands, mineral interests, and moneys, herein provided for and held in trust by the United States shall he the absolute property of the individual members of the Osage tribe, according to the roll herein provided for. or their heirs, as herein provided, and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, and said moneys shall be distributed to said members, or to their heirs, as herein provided, and said members shall have full control of said lands, moneys, and mineral interests, except as hereinbefore provided.

SEC. 6. That the lands, moneys, and mineral interests, herein provided for of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally.

SEC. 7. That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their

heirs, as herein provided: and said members, or their heirs, shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof: *Provided*, That parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority: *And provided further*, That all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior.

SEC. 8. That all deeds to said Osage lands or any part thereof shall be executed by the principal chief for the Osages, but no such deeds shall be valid until approved by the Secretary of the Interior.

SEC. 9. That there shall be a biennial election of officers for the Osage tribe as follows: A principal chief, an assistant principal chief, and eight members of the Osage tribal council, to succeed the officers elected in the year nineteen hundred and six, said officers to be elected at a general election to be held in the town of Pawhuska, Oklahoma Territory, on the first Monday in June; and the first election for said officers shall be held on the first Monday in June, nineteen hundred and eight, in the manner to be prescribed by the Commissioner of Indian Affairs, and said officers shall be elected for a period of two years, commencing on the first day of July following said election, and in case of a vacancy in the office of principal chief, by death, resignation, or otherwise,

the assistant principal chief shall succeed to said office, and all vacancies in the Osage tribal council shall be filled in a manner to be prescribed by the Osage tribal council, and the Secretary of the Interior is hereby authorized to remove from the council any member or members thereof for good cause, to be by him determined.

SEC. 10. That public highways or roads, two rods in width, being one rod on each side of all section lines, in the Osage Indian Reservation, may be established without any compensation therefor.

SEC. 11. That all lands taken or condemned by any railroad company in the Osage Reservation, in pursuance of any Act of Congress or regulation of the Department of the Interior, for rights of way, station grounds, side tracks, stock pens and cattle yards, water stations, terminal facilities, and any other railroad purpose, shall be, and are hereby, reserved from selection and allotment and confirmed in such railroad companies for their use and benefit in the construction, operation, and maintenance of their railroads: *Provided*, That such railroad companies shall not take or acquire hereby any right or title to any oil, gas, or other mineral in any of said lands.

SEC. 12. That all things necessary to carry into effect the provisions of this Act not otherwise herein specifically provided for shall be done under the authority and direction of the Secretary of the Interior.

Approved, June 28,1906.